

## Applicant Details

First Name	Anna
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## Applicant Education

BA/BS From	Vanderbilt University
Date of BA/BS	May 2020
JD/LLB From	University of Virginia School of Law
	<a href="http://www.law.virginia.edu">http://www.law.virginia.edu</a>
Date of JD/LLB	May 12, 2024
Class Rank	School does not rank
Law Review/Journal	Yes
Journal(s)	Virginia Environmental Law Journal
	Virginia Law Review
Moot Court Experience	No

## Bar Admission

## Prior Judicial Experience

Judicial Internships/Externships **No**  
Post-graduate Judicial Law Clerk **No**

### **Specialized Work Experience**

### **Recommenders**

Law, David  
davidlaw@law.virginia.edu  
(434) 924-7675

Jaffe, Caleb  
cjaffe@law.virginia.edu  
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Schwartzman, Micah  
schwartzman@law.virginia.edu  
434-924-7848

**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

**Anna A. Sonju**

312 Alderman Road, Charlottesville, VA 22903 • (303) 589-3103 • bnd2tt@virginia.edu

June 12, 2023

The Honorable Jamar K. Walker  
U.S. District Court, E.D. Va.  
600 Granby Street  
Norfolk, VA 23510

Dear Judge Walker:

I am a rising third-year student at the University of Virginia School of Law, and I am writing to apply for a clerkship in your chambers following my graduation in May 2024.

I am particularly interested in living in Norfolk due to my ties to Virginia, where I attend law school and my long-term partner resides.

I am enclosing my resume, my law school transcript, and a writing sample. You will also be receiving letters of recommendation from Professors Micah Schwartzman, Cale Jaffe, and David Law. If you would like to reach them, Professor Schwartzman's telephone number is (434) 924-7848, Professor Jaffe's telephone number is (434) 924-4776, and Professor Law's telephone number is (434) 924-7675.

Please feel free to reach out to me if I can provide any additional information. Thank you for your consideration.

Sincerely,

Anna Sonju

## Anna A. Sonju

312 Alderman Road, Charlottesville, VA 22903 • (303) 589-3103 • bnd2tt@virginia.edu

### EDUCATION

#### University of Virginia School of Law, Charlottesville, VA

*Juris Doctor*, Expected May 2024

- *Virginia Law Review*, Editorial Board
  - Student Note selected for publication (forthcoming April 2024)
- *Virginia Environmental Law Journal*, Projects Director
- Environmental Law and Community Engagement Clinic
  - Drafted *amicus* brief and journal article submission (pending)
- Merit Scholarship

#### Vanderbilt University, Nashville, TN

*Bachelor of Arts*, Molecular and Cellular Biology (Minors: Chemistry, Spanish), May 2020

- Recipient of Nichols' Humanitarian Fund Award (volunteered as a researcher with the Maldives Whale Shark Research Programme)
- Swingin' Dore's A Cappella, Musical Director and Vice President

### EXPERIENCE

#### Winston & Strawn LLP, Chicago, IL

*Summer Associate*, May 2023 – present

- Research and draft memoranda regarding patent and complex commercial litigation

#### Professor David Law, University of Virginia School of Law, Charlottesville, VA

*Research Assistant*, November 2022 – present

- Research history and development of Asian values and constitutional law in Asia
- Edit, cite check, and proofread draft for forthcoming book chapter

#### Bradley Arant Boult Cummings LLP, Nashville, TN

*Summer Associate*, May 2022 – July 2022

- Researched and drafted memoranda regarding trademark infringement, regulatory compliance, and class action litigation
- Drafted patent office action response strategy and complaint

#### Glenmoor Country Club, Cherry Hills Village, CO

*Tennis Professional*, May 2021 – August 2021

- Provided tennis lessons and match coaching to youth tennis players

#### Vail Resorts, Breckenridge, CO

*Alpine Ski Professional*, November 2020 – May 2021

- Provided ski lessons to novice and intermediate skiers in English and Spanish

#### Vanderbilt University Medical Center, Nashville, TN

*Research Assistant*, January 2018 – April 2019

- Performed medical research studying mitochondrial cardiac function under oxidative stress
- Drafted scientific report presented at 2019 Experimental Biology Conference

### PERSONAL

**Languages:** Spanish (professional working), Japanese (elementary)

**Interests:** Racquet sports, NBA basketball, chess, baking, hiking

UNIVERSITY OF VIRGINIA  
SCHOOL OF LAW

Name: Anna Sonju

Date: June 06, 2023

Record ID: bnd2tt

This is a report of law and selected non-law course work (including credits earned). This is not an official transcript.

Due to the global COVID-19 pandemic, the Law faculty imposed mandatory Credit/No Credit grading for all graded classes completed after March 18 in the spring 2020 term.

**FALL 2021**

LAW	6000	Civil Procedure	4	B+	Woolhandler, Nettie A
LAW	6002	Contracts	4	B+	Nachbar, Thomas B
LAW	6003	Criminal Law	3	B+	Bonnie, Richard J
LAW	6004	Legal Research and Writing I	1	S	Buck, Donna Ruth
LAW	6007	Torts	4	B+	Abraham, Kenneth S

**SPRING 2022**

LAW	7788	Science and the Courts (SC)	1	A-	Rakoff, Jed S
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**SPRING 2022**

LAW	6001	Constitutional Law	4	B	Mahoney, Julia D
LAW	7023	Emply Law: Contrcts/Torts/Stat	3	B+	Verkerke, J H
LAW	6104	Evidence	4	B+	Mitchell, Paul Gregory
LAW	6005	Lgl Research & Writing II (YR)	2	S	Buck, Donna Ruth
LAW	6006	Property	4	B+	Schragger, Richard C.

**FALL 2022**

LAW	6102	Administrative Law	4	B+	Duffy, John F
LAW	9077	Asian Amer and the Law	2	B+	Law, David S.
LAW	7017	Con Law II: Religious Liberty	3	A	Schwartzman, Micah Jacob
LAW	7009	Criminal Procedure Survey	4	B+	Harmon, Rachel A
LAW	9327	Law & Social Science Colloquium	1	B+	Mitchell, Paul Gregory

**SPRING 2023**

LAW	7692	Persuasion (SC)	1	B+	Shadel, Molly Bishop
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**SPRING 2023**

LAW	8003	Civil Rights Litigation	3	B+	Frampton, Thomas Ward
LAW	7103	Education Law Survey	3	A	Robinson, Kimberly Jenkins
LAW	8640	Enviro and Comm Eng Clinic	4	B+	Jaffe, Caleb Adam
LAW	6112	Environmental Law	3	B+	Livermore, Michael A.
LAW	7612	Genetics: Exerc Rule-Mkg (SC)	1	B+	Siegal, Gil

June 11, 2023

The Honorable Jamar Walker  
Walter E. Hoffman United States Courthouse  
600 Granby Street  
Norfolk, VA 23510-1915

Dear Judge Walker:

I am pleased to recommend Anna Sonju for a clerkship in your chambers. Anna was a student in my Asian Americans and the Law class in fall 2022, and I subsequently recruited her to serve as my research assistant. She has a particular interest in the intersection of law and science (e.g., IP; environmental law), which makes sense in light of her hard-science training: she studied molecular and cellular biology (with a minor in chemistry) at Vanderbilt before attending UVA Law. Post-graduation, she will be joining a patent litigation group, and she is particularly interested in clerkships with an IP / environmental law angle.

Her research work for me has consisted of a combination of substantive research (spanning both law and political science), editing, proofreading, and cite-checking. As my research assistant over the last couple of months, she has required very little instruction or supervision and has been capable, reliable, careful, and very easy to work with. For her first assignment (survey the scholarly empirical literature on the supposed phenomenon of Asian values), she came up with a thoughtful selection of materials that were on point and showed good judgment; she neither deluged me with materials of mixed quality nor delivered tangential or irrelevant materials. The subsequent proofreading/citechecking assignment went smoothly and on time and was of high quality. A lot of research assistants, especially in their initial outings, will go overboard by correcting things that aren't really errors, with the result that I have to roll back the overediting. Again, Anna showed good judgment and restraint. In terms of personality, she is relaxed, direct, and uncomplaining and has no difficulty accepting instructions or critical feedback. She comes across as being very mature and able to get along with a wide variety of people, which I suspect reflects a degree of worldliness from having lived in four or five different countries and having a cross-cultural family background.

Her raw academic performance thus far has been middle of the road by UVA standards, but with flashes of excellence in areas of particular interest (Judge Rakoff's Science and the Law course; Prof. Schwartzman's advanced con law course). As there were only 11 students in my Asian Americans and the Law class, most people (including Anna) received the mandatory mean of B+. Most of the final papers received average grades because they were competently written and did a good job of synthesizing and applying course materials but did not develop original arguments that went beyond the course materials; Anna's paper was typical in these regards. In terms of class participation, she was (like many students here at UVA) on the quiet and thoughtful side: she did not volunteer frequently, but she showed good preparation and spoke thoughtfully and in a measured way whenever she did volunteer or was called on.

Anna is very well suited to a judicial clerkship. In terms of raw intellect, she has no trouble keeping up, but just as importantly, she is a responsible and conscientious worker who can figure out what she is supposed to do with minimal instruction and gets along well with just about everyone, as far as I can tell. She would be an especially great pickup for any chambers interested in a law clerk with a science background who is a team player and especially well suited by both training and interest to handle IP and law and science matters. I recommend her without reservation.

Best,

David S. Law

David Law - davidlaw@law.virginia.edu - (434) 924-7675

Cale Jaffe  
University of Virginia School of Law  
580 Massie Road  
Charlottesville, VA 22903

June 10, 2023

The Honorable Jamar Walker  
Walter E. Hoffman United States Courthouse  
600 Granby Street  
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to offer an extremely enthusiastic and heartfelt recommendation for Anna Sonju, who has applied for a clerkship in your chambers. I came to know Anna as a student in the Environmental Law and Community Engagement Clinic for the Spring 2023 semester. Enrollment in the Clinic is managed through a competitive application process. Once admitted, students must make a significant commitment to working on Clinic cases—13 hours per week, on average, over the course of the semester.

Because of this structure, the Clinic gives me a unique opportunity to assess students in a real-world, office-like environment. In this environment, Anna has excelled. Through our one-on-one check-ins to go over her writing and through her outstanding participation in the seminar portion of the Clinic (where we workshopped drafts of briefs and discussed case strategy), I have come to know Anna as an astounding student-lawyer.

The Law School imposes a strict curve on graded classes, including clinics. This past semester, I had only two other students enrolled with Anna in the Spring Clinic, making it impossible to recognize her achievements with a grade. To give her an A or A- would have required giving another student a below-mean B or lower—and no student this Spring merited a low grade. Rest assured; I have no hesitation about the quality of Anna's excellent work. Without the imposition of a curve, she would have earned an A. (Next academic year, I am switching to an Honors/Pass/Fail grading system to avoid the dilemma I faced with letter grades this Spring.)

After observing Anna's work closely over the last semester, I can confidently say she will make a top-notch lawyer and is one of the first people I would want to hire to join a legal team. She is exceptionally bright and hard-working. She volunteered for some of the "grunt" work that no student wants—e.g., reviewing and editing the transcripts of client interviews for potential use in legal filings. At the same time, she flourished on some of the more challenging, intellectual work like researching and drafting an amicus brief to the Virginia Court of Appeals.

Indeed, her work on the amicus brief was remarkable. The case, Layla H. et al. v. Commonwealth, considered complex and novel claims alleging a substantive due process right to a healthy environment. Our amicus client in the case was Virginia Clinicians for Climate Action, an organization of medical professionals concerned about climate change and the worsening health impacts of increasing greenhouse gas pollution.

Drafting a brief from the perspective of medical clinicians was challenging, as it required students to synthesize medical-journal research on the Social Determinants of Public Health with state constitutional legal questions. Given Anna's impressive background (majoring in Molecular and Cellular Biology and minoring in Chemistry at Vanderbilt), she was a natural fit for this project. She took the lead for the Clinic in digesting the medical literature and translated it into language that would resonate with a layperson audience.

What was most impressive about Anna's work on the brief, however, was the collaborative spirit that she brought to the assignment. I preach to students that there can be "no pride in authorship" when it comes to legal writing. We work as a team and we need to be relentless in jettisoning weaker arguments and refining stronger ones. No other student I have taught has ever been as committed to this idea. Anna always put the quality of the brief first without worrying about whether she received any credit for it.

But make no mistake, Anna deserves credit for the impressive quality of her writing. The Virginia Law Review selected her excellent student note—on First Amendment, free-exercise claims over indigenous sacred sites—for publication. It is a testament to Anna's strength as a writer and thinker. As with the amicus brief, Anna synchronized two, disparate areas of research—constitutional law and the sociology of indigenous religions—to produce one of the strongest student Notes I have read.

I should add that Anna was a stellar contributor during the seminar portion of our Clinic, when we would discuss all of the students' projects in addition to debating supplemental readings that I would assign. She was a steady contributor and respectful listener during these sessions. Anna is kind, gracious, thoughtful, and generous to her colleagues. She is a joy to be around. Because of these traits, I have no doubt she would be an excellent addition to any judicial chamber. I would absolutely hire Anna in a minute.

Sincerely,

Cale Jaffe

Caleb Jaffe - [cjaffe@law.virginia.edu](mailto:cjaffe@law.virginia.edu) - (434) 924-4776

Professor of Law, General Faculty  
Director of the Environmental Law & Community Engagement Clinic

Caleb Jaffe - [cjaffe@law.virginia.edu](mailto:cjaffe@law.virginia.edu) - (434) 924-4776



June 12, 2023

The Honorable Jamar Walker  
Walter E. Hoffman United States Courthouse  
600 Granby Street  
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing on behalf of Anna Sonju, who has applied for a clerkship in your chambers. I have chaired the faculty clerkships committee at Virginia for nearly fifteen years. In that capacity, I have worked hundreds of students who have placed in federal and state clerkships, and I am confident that Anna is going to make an excellent clerk. She has intellectual range, with training in the sciences, strong analytical ability, and skill in legal writing. Those virtues, along with her demonstrated work ethic, lead me to recommend her to you with great enthusiasm.

Anna wrote a terrific paper for me in Constitutional Law II: Religious Liberty. In the fall of 2022, I had 72 students, including most of the top-25 in the second-year class. I allow a paper option instead of a traditional exam, and 20 students chose to exercise it. Many of them submitted their papers to the Virginia Law Review for publication. This year, only Anna's was selected. Over the last several years, the Notes editors of the Law Review have seen dozens of papers from students in my class, and the bar has risen on successfully placing a paper on any topic having to do with religious liberty. That Anna managed to get hers through the process is no small achievement.

Anna's paper, entitled *Free Exercise Claims Over Indigenous Sacred Sites: Justice Long Overdue*, focuses on the aftermath of *Lyng v. Northwest Indian Cemetery Protection Association*, 485 U.S. 439 (1988), in which the Supreme Court rejected a free exercise challenge brought by Native American groups seeking to protect sacred lands on federal property. Against the Court's restrictive understanding of what counts as a "substantial burden" under the Free Exercise Clause, Anna proposes a modified coercion test that accounts for the significance of indigenous sacred lands, but without allowing endless and anarchic challenges to internal government decisions. Threading that needle has been difficult in free exercise jurisprudence, and with pending litigation in *Apache Stronghold v. United States*, there is considerable interest in resolving the problem. Anna's solution might well find an audience, especially if the Supreme Court decides to revisit this issue, which seems very possible.

Anna's performance in my class is a highlight for her at UVA. She obviously excels in legal research and writing. Her paper is a clear example of sustained and superb academic work. Given her background in biology and chemistry (and without any lawyers in her family), I suspect she had to make more of an adjustment coming to law school. For that reason, I think that her grades understate her intellectual abilities. I would expect that her grades will continue to improve through graduation, especially in courses that emphasize extensive writing. Anna has taken a difficult course load, in subjects far from her undergraduate studies. I give her credit for branching out and for taking on these challengers. She is going to be a better lawyer and a stronger writer for doing it.

On a personal note, I have greatly enjoyed getting to know Anna. She obviously has a passion for environmental law. I am sure that growing up out west, in Colorado, has shaped her interests, both in environmental issues and in overlapping concerns about Native American lands. Whether Anna pursues these interests or decides to build on her science background, perhaps through patent law, I am confident that she will bring great energy and determination to her work. I also know that she will be a team player, who is open-minded, friendly, and empathetic. She is going to get along well with anyone in chambers, and I have to think her co-clerks will enjoy her trust and friendship.

Based on her academic work, her writing ability, and her intellectual breadth and determination, I am confident that Anna will be an excellent clerk. I hope you give her careful consideration.

If you have any questions, please feel free to reach me at 434-924-7848.

Sincerely,

/s/

Micah J. Schwartzman  
Hardy Cross Dillard Professor of Law  
Roy L. and Rosamond Woodruff Morgan  
Professor of Law  
University of Virginia School of Law  
580 Massie Road  
Charlottesville, Virginia 22903-1738  
Phone: 434-924-7848  
Fax: 434-982-2845  
Email: [schwartzman@law.virginia.edu](mailto:schwartzman@law.virginia.edu)

Micah Schwartzman - [schwartzman@law.virginia.edu](mailto:schwartzman@law.virginia.edu) - 434-924-7848

**Anna A. Sonju**

312 Alderman Road, Charlottesville, VA 22903 • (303) 589-3103 • bnd2tt@virginia.edu

The attached writing sample is a Student Note I wrote, which is derived from my final paper for Constitutional Law II: Religious Liberty with Professor Micah Schwartzman. In this excerpt, I analyze and argue for a change in the Supreme Court's free exercise jurisprudence as it pertains to Indigenous sacred sites. The full Note is available upon request. This writing sample is entirely my own work product.

## FREE EXERCISE CLAIMS OVER INDIGENOUS SACRED SITES: JUSTICE LONG OVERDUE

Free exercise claims seeking protection of Native American sacred sites have seldom succeeded following the Supreme Court’s ruling in *Lyng v. Northwest Indian Cemetery Protective Association*.<sup>1</sup> In *Lyng*, Native American tribes brought a claim that the government’s designation of a construction project for a sacred site violated their free exercise rights guaranteed by the First Amendment.<sup>2</sup> The majority struck down this challenge, rejecting the claimants’ argument that the government imposed a substantial burden on their free exercise rights since they were not “coerced by the Government’s action into violating their religious beliefs.”<sup>3</sup>

Since *Lyng*, courts have repeatedly struck down free exercise claims involving Native American sacred sites,<sup>4</sup> reaffirming the notion that the government has imposed a substantial burden on a Native American party’s free exercise rights concerning a sacred site *only* when its action amounts to an affirmative act of coercion under threat of sanctions.<sup>5</sup> Although Congress subsequently passed multiple laws aimed at protecting religious freedom,<sup>6</sup> including one directed specifically at Native American religious liberty,<sup>7</sup> these statutes have also failed to create a judicially enforceable cause of action.<sup>8</sup>

<sup>1</sup> 485 U.S. 439 (1988).

<sup>2</sup> *Id.* at 443.

<sup>3</sup> *Id.* at 449.

<sup>4</sup> See, e.g., *Navajo Nation v. United States Forest Serv.*, 535 F.3d 1058 (9th Cir. 2008); *Apache Stronghold v. United States*, 38 F.4th 742, 759 (9th Cir. 2022); *Badoni v. Higginson*, 638 F.2d 172, 177 (10th Cir. 1980); *Slockish v. United States Fed. Highway Admin.*, No. 08-CV-01169, 2018 WL 2875896 (D. Or. June 11, 2018).

<sup>5</sup> *Navajo Nation v. United States Forest Serv.*, 535 F.3d 1058, 1070 (9th Cir. 2008) (holding that the government had not imposed a substantial burden on Plaintiffs because it did not “coerce the Plaintiffs to act contrary to their religion under the threat of civil or criminal sanctions.”).

<sup>6</sup> See Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et. seq.*; Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et. seq.*

<sup>7</sup> See American Indian Religious Freedom Act, 42 U.S.C. § 1996.

<sup>8</sup> See *Lyng*, 485 U.S. at 455 (“[AIRFA does] not ‘confer special rights on Indians,’ [does] ‘not change any existing State or Federal law,’ and in fact ‘has no teeth in it.’”) (quoting 124 Cong. Rec. 21444 (1978)). See also *Wilson v.*

This Note argues that the *Lyng* Court's narrow interpretation of the substantial burden test necessarily precludes the success of Native American free exercise claims involving sacred sites. In response, this Note introduces an alternative meaning of coercion within the Court's substantial burden framework, which would afford sacred site claims a realistic possibility of passing muster. Part I provides a history and background of free exercise jurisprudence and legislation surrounding Native American sacred sites. It presents an overview of the substantial burden test established originally in *Sherbert v. Verner*<sup>9</sup> and *Wisconsin v. Yoder*<sup>10</sup> and adopted in *Lyng* and its progeny, followed by an analysis of failed statutory attempts to protect Native American religious liberty. Lastly, Part I highlights why *Lyng* fails to protect free exercise rights and demands a reformulation of sacred site claims within the contours of the *Sherbert/Yoder* test.

## **I. The Road from *Sherbert/Yoder* to Now**

Part I argues for the necessity of a modified substantial burden test in the context of Native American sacred sites. Part A provides background on free exercise jurisprudence leading up to and including the Supreme Court's *Lyng* decision. Part B overviews Congress's codification of free exercise rights and explains why these statutes have failed to effectively protect Native American religions in practice. Part C concludes by urging the Court to modify its standard of review for sacred site free exercise claims by broadening its preexisting framework.

### **A. Strict Scrutiny Under *Sherbert/Yoder/Lyng* and its Implications for Sacred Sites**

The Supreme Court's decision in *Lyng* arrived amid a line of cases epitomizing the Court's unwillingness to seriously entertain most free exercise claims. First, in *Sherbert* the

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Block, 708 F.2d 735 (D.C. Cir. 1983) ("AIRFA requires federal agencies to consider, but not necessarily to defer to, Indian religious values.").

<sup>9</sup> 374 U.S. 398 (1963).

<sup>10</sup> 406 U.S. 205 (1972).

Court established a strict scrutiny test for free exercise claims.<sup>11</sup> This required plaintiffs alleging a free exercise violation to initially demonstrate that the government has imposed a burden on the free exercise of their religion.<sup>12</sup> Upon such a showing, the government needed to prove that its infringement of a plaintiff's free exercise rights was "justified by a 'compelling state interest,'" <sup>13</sup> otherwise the free exercise challenge would prevail. In *Yoder*, the Court finetuned its definition of "burden," clarifying that the government action at issue must "*unduly* burden[] the free exercise of religion."<sup>14</sup> The Court applied this standard stringently in future cases: with the exception of *Yoder*, the Court upheld only those free exercise challenges with facts closely reminiscent to *Sherbert*.<sup>15</sup>

A few years after *Yoder*, the Court in *Lyng* endorsed a fatally narrow meaning of burden which implicitly prevented any sacred site free exercise claim thereafter from succeeding. *Lyng* involved a challenge to a federal timber and road construction project set to occur on sacred lands historically used for Native American religious rituals.<sup>16</sup> Justice O'Connor, writing for the majority, rejected the plaintiffs' claim that their free exercise rights had been violated.<sup>17</sup> In so doing, she concluded that the government has only unduly burdened one's religion if it "coerce[s] individuals into acting contrary to their religious beliefs" or "penalize[s] the exercise of religious rights by denying religious adherents an equal share of the rights, benefits, and

<sup>11</sup> *Sherbert*, 374 U.S. 398 (1963).

<sup>12</sup> *Id.* at 403.

<sup>13</sup> *Id.* (quoting Nat'l Ass'n for Advancement of Colored People v. Button, 371 U.S. 415, 438 (1963)).

<sup>14</sup> *Yoder*, 406 U.S. at 220 (emphasis added).

<sup>15</sup> James E. Ryan, Note, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1414 (1992) ("[S]ince establishing the test in *Sherbert v. Verner* in 1963, the Court rejected thirteen of the seventeen free exercise claims it heard. Moreover, three of the four victories involved unemployment compensation and thus were governed by the explicit precedent of *Sherbert*. . . . [E]ven the holding in *Yoder*, exempting Amish children from compulsory school attendance laws, seems limited to the facts of that case and the adherents of the Amish order."). To view the three unemployment successful compensation cases, see *Frazee v. Ill. Dep't of Emp. Sec.*, 489 U.S. 829 (1989); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987); *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707 (1981).

<sup>16</sup> *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 439 (1988).

<sup>17</sup> *Id.*

privileges enjoyed by other citizens.”<sup>18</sup> According to Justice O’Connor, the plaintiffs in *Lyng* failed to satisfy the above test because (1) a government action is not coercive if it merely interferes incidentally with a claimant’s religious practices without a threat of penalties, and (2) the plaintiffs were not denied rights, benefits, and privileges enjoyed by other citizens.<sup>19</sup>

In her majority opinion, Justice O’Connor did not dispute that the government project at issue in *Lyng* could have potentially “devastating effects on traditional Indian religious practices.”<sup>20</sup> Nevertheless, she maintained that even if the government action would wholly *destroy* the Native Americans’ ability to practice their religion, their claim would still fail because holding otherwise would require the government “to satisfy every citizen’s religious needs and desires.”<sup>21</sup> In her view, if a government action did not actively *prohibit*<sup>22</sup> free exercise of religion with threat of penalties, individuals were not entitled to “a veto over public programs,”<sup>23</sup> such as government projects on sacred sites. This formulation of the *Sherbert/Yoder* test created an impossible hurdle for Native Americans: it gave the government free reign to pursue practically any project on a sacred site without being considered coercive under the Free Exercise Clause, as long as it did not explicitly ban Native Americans’ access to those sites.

The Court’s impossibly high standard moreover minimized the government’s responsibility to mitigate the detrimental effects of its projects on sacred sites in two principal

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<sup>18</sup> *Id.* at 440.

<sup>19</sup> *Id.* The second substantial burden factor is inapplicable to this Note because it is relevant only when a plaintiff has been denied explicit benefits conferred by the government, such as unemployment benefits. *See, e.g.,* *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707 (1981) (involving denial of unemployment benefits to a religious applicant); *Sherbert v. Verner*, 374 U.S. 398 (1963) (concerning denial of unemployment benefits to a religious claimant who refused to work during the Sabbath).

<sup>20</sup> *Id.* at 451.

<sup>21</sup> *Id.* at 452.

<sup>22</sup> *Id.* at 453 (“A law prohibiting the Indian respondents from visiting the Chimney Rock area would raise a different set of constitutional questions.”)

<sup>23</sup> *Id.* at 452.

ways.<sup>24</sup> First, the *Lyng* majority dismissed the American Indian Religious Freedom Act (AIRFA)<sup>25</sup>—a statute enacted to protect and preserve Native Americans’ religious freedoms and access to sacred sites—as creating no judicially enforceable right.<sup>26</sup> Thus, this once-promising statute is now little more than a policy aspiration, conferring no legal responsibility on the government to prioritize Native American religious rights. Second, since the standard is exceptionally demanding of plaintiffs, the onus rarely shifts to the government to demonstrate its compelling interest and use of the least restrictive means in pursuing that interest.<sup>27</sup> Therefore, in practice the government never actually needs to have a compelling interest to prevail under *Lyng*.<sup>28</sup> It can instead rely on the fact that judicial review will terminate before it ever carries the evidentiary burden. After *Lyng*, we are accordingly left with scant legal protection of sacred sites, and few incentives for the government to avoid them.

### B. Rational Basis Under *Smith* and Statutory Responses

Just two years after *Lyng*, in *Employment Division v. Smith*<sup>29</sup> the Supreme Court disallowed religious exemptions from compliance with neutral and generally applicable laws, abandoning the substantial burden test entirely and opting for rational basis review. This drastic

<sup>24</sup> Justice O’Connor did mention all the mitigation steps the government took in the construction project at issue in *Lyng*. *Id.* at 454 (“It is worth emphasizing, therefore, that the Government has taken numerous steps in this very case to minimize the impact that construction of the G–O road will have on the Indians’ religious activities.”). However, nothing in this portion of the opinion confers legal responsibility on the government since the Court never reached the government interest prong of the substantial burden test.

<sup>25</sup> The American Indian Religious Freedom Act (AIRFA) asserts that “it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.” American Indian Religious Freedom Act, 42 U.S.C. § 1996.

<sup>26</sup> *Lyng*, 485 U.S. at 455 (explaining that the Act’s legislative history suggests that it does not give Native Americans special religious rights).

<sup>27</sup> Ryan, *supra* note 15, at 1416. (“[Prior to *Smith*], to show a burden was often to present simultaneously the government’s compelling interest. Conversely, if the government’s involvement or interference was not strong, i.e., its interest was not compelling, it was unlikely that a burden could be demonstrated.”).

<sup>28</sup> See *Lyng*, 485 U.S. at 473 (Brennan, J., dissenting) (“[T]he Court has effectively bestowed on one party to this conflict the unilateral authority to resolve all future disputes in its favor.”).

<sup>29</sup> 494 U.S. 872 (1990).

swerve in doctrine was met by the public with “condemnation and despair,”<sup>30</sup> which swiftly led to a legislative resolution: the Religious Freedom Restoration Act of 1990 (RFRA).<sup>31</sup> RFRA essentially reinstated the strict scrutiny language devised in *Sherbert/Yoder*, formally establishing the “substantial burden” test for free exercise claims. Then, in *City of Boerne v. Flores*,<sup>32</sup> the Court held unconstitutional portions of RFRA that applied to state and local government actions. Congress, however, responded swiftly by enacting the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA)<sup>33</sup> as an extension of RFRA, which applied heightened judicial review to state and local government actions restricting religious exercise in the land use and prison contexts.

While there are competing theories on the relevance of pre-*Smith* free exercise cases as authority after RFRA’s enactment,<sup>34</sup> the Court has since overall interpreted RFRA as providing “very broad protection for religious liberty.”<sup>35</sup> It has not, however, specifically addressed the persuasiveness of *Lyng* in sacred site claims after RFRA. Nevertheless, neither RFRA nor RLUIPA have offered any extra protection for Native American sacred sites in lower courts. Even after RFRA’s enactment and the Supreme Court’s broad interpretation of the text, lower courts have consistently relied on *Lyng* as binding authority in evaluating Native American free exercise claims.<sup>36</sup> For example, in *Navajo Nation v. United States Forest Service*,<sup>37</sup> the Ninth

<sup>30</sup> Ryan, *supra* note 15, at 1409.

<sup>31</sup> Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et. seq.*

<sup>32</sup> 521 U.S. 507 (1997).

<sup>33</sup> Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et. seq.*

<sup>34</sup> See Micah J. Schwartzman, *What Did RFRA Restore?*, RELIGIOUS FREEDOM INSTITUTE (Sept. 11, 2014), <https://religiousfreedominstitute.org/2016-6-30-what-did-rfra-restore/>.

<sup>35</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 685 (2014).

<sup>36</sup> See, e.g., *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 239 F. Supp. 3d 77, 93 (D.D.C. 2017) (“That *Lyng* was a Free Exercise, rather than a RFRA, case does not change its applicability here. . . . In enacting RFRA, Congress restored the compelling-interest test set forth in pre-*Smith* cases.”); *Real Alts., Inc. v. Sec’y Dep’t of Health & Hum. Servs.*, 867 F.3d 338, 363 (3d Cir. 2017) (“[I]n passing RFRA, Congress bolstered *Lyng*’s reading of the Free Exercise Clause with RFRA’s text and legislative history.”).

<sup>37</sup> 535 F.3d 1058 (9th Cir. 2008).



Circuit rejected a challenge to the federal government’s use of a sacred mountain for creating artificial snow for skiing. In its reasoning the court affirmed the exact burden test in *Lyng*, finding that it was “consistent with the *Sherbert* standard codified in RFRA.”<sup>38</sup> RLUIPA’s protection of land has also proven entirely futile in the sacred site context—appellate courts have only applied RLUIPA to government land-use regulations of private land, and sacred sites are generally on public land.<sup>39</sup>

### C. The Need for Change in Free Exercise Doctrine

The evolution of free exercise jurisprudence has highlighted the need for a fundamental reconceptualization of the doctrine. The test set forth in *Lyng* is functionally rational basis wearing a strict scrutiny disguise,<sup>40</sup> and it is fatal in fact for sacred site claims. Despite how indispensable sacred sites are for the meaningful practice of Native American religions, courts erroneously focus not on maintaining the existence of the sites themselves, but rather, *access* to them. They care not about the government’s destruction of sacred sites, but whether it has physically prohibited religious claimants from accessing them. This perspective is utterly flawed—access to a sacred site does not protect free exercise rights if the site’s religious value has been decimated. Sacred sites are a physical manifestation of spiritual beings, and in order to protect Native American religions, they must be acknowledged as such.

A change in doctrine is moreover necessary because *Lyng* and its progeny fail to capture the spirit of the Free Exercise Clause generally.<sup>41</sup> James Madison, in his pursuit of religious

<sup>38</sup> *Id.* at 1073.

<sup>39</sup> *Id.* at 1077. *See also* *Apache Stronghold v. United States*, 38 F.4th 742, 759 (9th Cir. 2022) (holding that RLUIPA only applies to private land).

<sup>40</sup> *See* Ryan, *supra* note 15, at 1416 (“*Smith* in one sense achieved wholesale what the Court had already been doing retail.”)

<sup>41</sup> *See, e.g., Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 477 (1988) (Brennan, J., dissenting) (“The safeguarding of such a hollow freedom not only makes a mockery of the ‘policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the[ir] traditional religions . . . it fails utterly to accord with the dictates of the First Amendment.”).

liberty, emphasized that people deserve “*equal* title to the free exercise of [r]eligion according to the dictates of [c]onscience.”<sup>42</sup> *Lyng* plainly fails to fulfill this purpose. To clarify, placing the onus on Native Americans to demonstrate a substantial burden does not itself deprive them of equal title to free exercise. Indeed, the standard of scrutiny is high for all religious claimants, and the Court has denied most claims for religious exemptions since *Sherbert*, regardless of their religion.<sup>43</sup> However, unlike with sacred sites, the Court has willingly granted exemptions to individuals coerced into specific *acts* contrary to their religious principles.<sup>44</sup> On the other hand, the Court’s treatment of Native American *land* has proven to demand a completely different level of scrutiny. That is, unless the government explicitly bans access to a sacred site, which it will almost never do, it is simply impossible for Native American claimants to meet their evidentiary burden. Thus, the Court’s unique hostility to sacred site claims can hardly be seen as granting Native Americans equal title to free exercise rights.

The Court in *Lyng* justifiably cited concern that veering away from the substantial burden test could potentially open the floodgates to endless litigation, tasking courts with “reconcil[ing] the various competing demands on government, many of them rooted in sincere religious belief, that inevitably arise in so diverse a society as ours.”<sup>45</sup> This objection would surely be reasonable if the Court was asked to lower the plaintiff’s burden generally for *all* government actions, as Justice O’Connor implied would happen if the Court strayed from the test.<sup>46</sup> However, if the Court narrowly modifies the substantial burden inquiry for claims *only* rooted in the niche

<sup>42</sup> JAMES MADISON, MEMORIAL AND REMONSTRANCE ¶15 (1819).

<sup>43</sup> See Ryan, *supra* note 15, at 1414 (“[T]he Court rejected thirteen of the seventeen free exercise claims it heard.”).

<sup>44</sup> See, e.g., *Hobby Lobby*, 573 U.S. 682 (2014); *Holt v. Hobbs*, 574 U.S. 352 (2015); *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707 (1981).

<sup>45</sup> *Lyng*, 485 U.S. at 452.

<sup>46</sup> *Id.* (expressing concern that challenges will be brought to “a broad range of government activities—social welfare programs to foreign aid to conservation projects.”).

context of access to sacred sites or analogous types of land, such a change will not give citizens a broad veto on an array of government actions.

In sum, *Lyng* destroyed the viability of essentially all sacred site free exercise claims by establishing a hurdle that Native American claimants can never overcome. Further, the judiciary and legislature have since failed to address this problem. Such treatment of sacred sites reflects a fundamental misunderstanding of Native American religions, and simply runs counter to the purpose of the Free Exercise Clause and the values of the Founding Fathers. If courts are to ever ensure equal free exercise rights to all religious claimants, the Supreme Court must expand its conception of substantial burden to level the playing field for sacred site claims.

## Applicant Details

First Name	Benjamin											
Last Name	Spencer											
Citizenship Status	U. S. Citizen											
Email Address	<a href="mailto:benjamin.spencer@duke.edu">benjamin.spencer@duke.edu</a>											
Address	<table><tr><th>Address</th></tr><tr><td>Street</td></tr><tr><td>4225 Larchmont Road, Apt. 1127</td></tr><tr><td>City</td></tr><tr><td>Durham</td></tr><tr><td>State/Territory</td></tr><tr><td>North Carolina</td></tr><tr><td>Zip</td></tr><tr><td>27707</td></tr><tr><td>Country</td></tr><tr><td>United States</td></tr></table>	Address	Street	4225 Larchmont Road, Apt. 1127	City	Durham	State/Territory	North Carolina	Zip	27707	Country	United States
Address												
Street												
4225 Larchmont Road, Apt. 1127												
City												
Durham												
State/Territory												
North Carolina												
Zip												
27707												
Country												
United States												
Contact Phone Number	(864) 492-2601											

## Applicant Education

BA/BS From	University of South Carolina-Columbia
Date of BA/BS	May 2021
JD/LLB From	Duke University School of Law <a href="https://law.duke.edu/career/">https://law.duke.edu/career/</a>
Date of JD/LLB	May 1, 2024
Class Rank	School does not rank
Law Review/Journal	Yes
Journal(s)	Duke Environmental Law and Policy Forum Duke Law and Technology Review Duke Journal of Constitutional Law and Public Policy
Moot Court Experience	No

## Bar Admission

## Prior Judicial Experience

Judicial Internships/ Externships	<b>Yes</b>
Post-graduate Judicial Law Clerk	<b>No</b>

### **Specialized Work Experience**

### **Recommenders**

Waitzkin, Michael  
michael.waitzkin@duke.edu  
2025281684

Benjamin, Stuart M.  
Benjamin@law.duke.edu  
(919) 613-7275

Raskin, Sarah  
sarah.raskin@duke.edu

**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

Benjamin A. Spencer  
4225 Larchmont Road  
Apt. 1127  
Durham, NC 27707

June 12, 2023

The Honorable Jamar K. Walker  
United States District Court for the  
Eastern District of Virginia  
600 Granby Street  
Norfolk, VA 23510

Dear Judge Walker,

I am writing to express my sincere interest in clerking for you, beginning any time after my graduation from Duke Law School in May of 2024. I can think of no more honorable way to begin my career than working for and learning from both you and the entire Eastern District of Virginia. As a native South Carolinian who has fond memories of growing up during hot and humid summers, I have always hoped to build a life and a career in the southeast.

Since my first time interning for a state judge during college, I have been fascinated by the dual nature of the judiciary—resolving past and present disputes, while being mindful of the future impact of the court’s words, arguments, and actions. In my time at Duke, I have continued to explore this relationship through my multifaceted work on three different journals, allowing me the opportunity to collaborate with other students while researching and writing on constitutional law, environmental law, education policy, transactional disputes, and technological innovation.

Alongside my law degree, I am pursuing a Masters in Bioethics and Science Policy. I have spent my law school summers working in public service roles, helping government agencies to confront the obstacles posed by novel public health threats and rapidly developing biotechnologies. I hope to help prepare your court to address these evolving challenges.

I have enclosed my resume, Duke Law transcript, and a draft of a Supreme Court commentary that I authored for the Duke Journal of Constitutional Law & Public Policy. Letters of recommendation from Professor Sarah Bloom Raskin, Professor Stuart Benjamin, and Professor Michael Waitzkin are included. Please contact me if you would like any additional materials or information. Thank you in advance for your consideration.

Sincerely,



Benjamin A. Spencer

**BENJAMIN A. SPENCER**

4225 Larchmont Road #1127, Durham, NC 27707 | bas108@duke.edu | (864) 492-2601

**EDUCATION**

**Duke University School of Law, Durham, NC**

*Juris Doctor and Masters of Bioethics and Science Policy* expected, May 2024

GPA: 3.65

Honors: B.S. Womble Scholarship

Interscholastic Transactional Law Competition, *First Place – Drafting*

Activities: Duke Bar Association, *Treasurer*

Duke Journal of Constitutional Law and Public Policy, *Special Projects Editor*

Duke Law and Technology Review, *Content Editor*

Duke Environmental Law and Policy Forum, *Executive Editor*

Transactional Law Society, *Executive Board Member*

Publications: *It Ain't Real Funky Unless It's Got That Pop: Artistic Fair Use After Goldsmith*,

Duke Journal of Constitutional Law and Public Policy, January 2023

**University of South Carolina, Columbia, SC**

Bachelor of Arts with Honors in Philosophy and Political Science, *summa cum laude*, May 2021

GPA: 3.99

Honors: Josiah Morse Award in Philosophy

Thesis: *American Absurdity: Comparing the Absurd in European and American Literature*

Study Abroad: Sonoma State University, Santa Rosa, CA, Fall 2019

University of Kent, Canterbury, United Kingdom, Spring 2020

Activities: WUSC-FM & HD-1 Columbia, *DJ*

UofSC Department of Psychology, *Neuroscience Research Assistant*

**EXPERIENCE**

**Food and Drug Administration, Office of the Chief Counsel, Silver Spring, MD**

*Legal Support Intern*, Summer 2023

- Analyzed statutes and cases to draft briefs and legislative proposals with litigators and counsel.

**National Institutes of Health, Bethesda, MD**

*Legal Research Assistant*, May 2022 – July 2022

- Conducted nationwide survey of statutes, regulations, and university policies governing the participation of wards of the state in human research.

**Target, Rock Hill, SC**

*Fulfillment Expert*, May 2021 – August 2021

- Retrieved and packaged online orders under strict time limitations.

**McGowan, Hood & Felder, Rock Hill, SC**

*Legal Assistant*, May 2019 – June 2020

- Assisted with depositions, mediations, trials, research, and drafting in medical malpractice cases.

**South Carolina Department of Justice, York, SC**

*Judicial Intern*, June 2018 – August 2018

**ADDITIONAL INFORMATION**

Publication: *Ethical Design: Policy Direction for Privacy in Emerging Biotechnologies and the Internet of People*, University of Alabama's Capstone Journal of Law and Public Policy, December 2019; presented paper at conference. Student Curator Extern at Smithsonian Institute, 2018. Authored forty-five magazine columns during high school for local magazine. Wrote ten novel-length works. Eagle Scout.

DUKE UNIVERSITY - Unofficial Transcript

Page 1 of 2

Name: Benjamin A. Spencer  
Student ID: 2380951

6/6/2023

Academic Program History

Program: Grad - Masters Bioethics  
(Status: Active in Program)  
Plan: Bioethics and Science Policy - Master's (Primary)

Beginning of Graduate Record

2022 Spring Term

Course	Description	Units Earned	Official Grade	Grading Basis
BIOETHIC 605	CONTEMPORARY ISSUES	1.500	CR	CNC
Term GPA: 0.000		Term Earned: 1.500		
Cum GPA: 0.000		Cum Earned: 1.500		

2022 Summer Term 1

Course	Description	Units Earned	Official Grade	Grading Basis
BIOETHIC 705	CAPSTONE: BIOETHICS & SCI POL	4.500	A	GRD
Term GPA: 4.000		Term Earned: 4.500		
Cum GPA: 4.000		Cum Earned: 6.000		

2022 Summer Term 2

Course	Description	Units Earned	Official Grade	Grading Basis
BIOETHIC 705	CAPSTONE: BIOETHICS & SCI POL	4.500	A	GRD
Term GPA: 4.000		Term Earned: 4.500		
Cum GPA: 4.000		Cum Earned: 10.500		

2022 Fall Term

Course	Description	Units Earned	Official Grade	Grading Basis
BIOETHIC 704	SCIENCE LAW AND POLICY	3.000	A	GRD
LAW 250	FAMILY LAW	2.000	A-	GRD
RESEARCH 1	RESEARCH	3.000	-	NOG
Term GPA: 3.880		Term Earned: 8.000		
Cum GPA: 3.957		Cum Earned: 18.500		

2023 Spring Term

Course	Description	Units Earned	Official Grade	Grading Basis
BIOETHIC 591	TOPICS IN SCIENCE POLICY	3.000	A	GRD
LAW 347	HEALTH CARE LAW/POLICY	3.000	A	GRD

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DUKE UNIVERSITY - Unofficial Transcript

Page 2 of 2

Name: Benjamin A. Spencer  
Student ID: 2380951

6/6/2023

Term GPA: 4.000      Term Earned: 6.000

Cum GPA: 3.970      Cum Earned: 24.500

**Graduate Career Earned**

Cum GPA: 3.970      Cum Earned: 24.500

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DUKE UNIVERSITY - Unofficial Transcript

Page 1 of 2

Name: Benjamin A. Spencer  
Student ID: 2380951

6/6/2023

Academic Program History

Program: Law School  
(Status: Active in Program)  
Plan: Law (JD) (Primary)  
Subplan:

Beginning of Law School Record

2021 Fall Term

Course	Description	Units Earned	Official Grade	Grading Basis
LAW 110	CIVIL PROCEDURE	4.500	3.8	GRD
LAW 130	CONTRACTS	4.500	3.3	GRD
LAW 160A	LEGAL ANLY/RESEARCH/WRIT	0.000	CR	CNC
LAW 180	TORTS	4.500	3.4	GRD

Term GPA: 3.500 Term Earned: 13.500

Cum GPA: 3.500 Cum Earned: 13.500

2022 Spring Term

Course	Description	Units Earned	Official Grade	Grading Basis
LAW 120	CONSTITUTIONAL LAW	4.500	3.5	GRD
LAW 140	CRIMINAL LAW	4.500	3.6	GRD
LAW 160B	LEGAL ANLY/RESEARCH/WRIT	4.000	3.3	GRD
LAW 200	ADMINISTRATIVE LAW	3.000	3.8	GRD

Term GPA: 3.534 Term Earned: 16.000

Cum GPA: 3.518 Cum Earned: 29.500

2022 Summer Term 2

Course	Description	Units Earned	Official Grade	Grading Basis
LAW 614	JD PROFESSIONAL DEVELOPMENT	0.000	CR	PFI

Term GPA: 0.000 Term Earned: 0.000

Cum GPA: 3.518 Cum Earned: 29.500

2022 Fall Term

Course	Description	Units Earned	Official Grade	Grading Basis
LAW 170	PROPERTY	4.000	3.8	GRD
Course Topic: 2L JDs only				
LAW 210	BUSINESS ASSOCIATIONS	4.000	4.0	GRD
LAW 240	ETHICS PROF RESPONSIBILITY	3.000	3.5	GRD

Term GPA: 3.790 Term Earned: 11.000

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DUKE UNIVERSITY - Unofficial Transcript

Page 2 of 2

Name: Benjamin A. Spencer  
Student ID: 2380951

6/6/2023

Cum GPA: 3.592 Cum Earned: 40.500

2023 Winter Term

Course	Description	Units Earned	Official Grade	Grading Basis
LAW 800	BASICS OF ACCOUNTING	0.500	CR	CNC
LAW 848	INSURANCE LAW	0.500	CR	CNC

Term GPA: 0.000 Term Earned: 1.000

Cum GPA: 3.592 Cum Earned: 41.500

2023 Spring Term

Course	Description	Units Earned	Official Grade	Grading Basis
LAW 245	EVIDENCE	3.000	3.9	GRD
LAW 270	INTELLECTUAL PROPERTY	4.000	4.0	GRD
LAW 307	INTERNET & TELECOM REGULATION	3.000	3.8	GRD
LAW 329	EDUCATION LAW	2.000	3.5	GRD
LAW 628	JD LEGAL WRITING	0.000		NOG

Term GPA: 3.841 Term Earned: 12.000

Cum GPA: 3.649 Cum Earned: 53.500

2023 Summer Term 2

Course	Description	Units Earned	Official Grade	Grading Basis
LAW 614	JD PROFESSIONAL DEVELOPMENT	0.000		PFI

Term GPA: 0.000 Term Earned: 0.000

Cum GPA: 3.649 Cum Earned: 53.500

Law School Career Earned

Cum GPA: 3.649 Cum Earned: 53.500

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MICHAEL B. WAITZKIN  
DEPUTY DIRECTOR  
(202) 528-1684 (CELL)  
[MICHAEL.WAITZKIN@DUKE.EDU](mailto:MICHAEL.WAITZKIN@DUKE.EDU)

March 15, 2023

Re: reference for Ben Spencer

I am writing to enthusiastically recommend Ben Spencer for a judicial clerkship.

While pursuing his JD degree, Ben has also enrolled in a joint Master of Arts in Bioethics & Science Policy. I am the Director of Graduate Studies for the MA degree and therefore know Ben as both an advisee and student. I have taught Ben in three classes and have had several long conversations with him about his background and career goals.

Ben is not a typical Duke Law student. He comes from a very small town – I believe the smallest town in South Carolina. He attended public schools and graduated summa cum laude from the University of South Carolina with honors in Philosophy and Political Science. He is a disc jockey, plays the bass guitar, knits hats, scarfs and sweaters, has written ten “terrible” novels – his words not mine, and is still an excellent law student.

When asked to distill his study of philosophy into a few words, he chose two – “Be Honest”. Ben strikes me as a person of great integrity. He comes to his own views on complex issues, always thoughtful and considered, and wholly unaffected by the overwhelming consensus opinions of the Duke Law student body. This is not to suggest that he applies a contrarian philosophy to his decision-making. To the contrary, his study of bioethics and science policy has reinforced his perspective that decisions should be made based on the facts and the science, not someone’s preferred version of facts or their disregard of science or law. For this reason, I believe he will be an excellent law clerk – he will follow the law, apply the facts and inform the decision by an understanding of the applicable science.

His major interest is in regulatory law and his summer work at the National Institutes of Health and the Food and Drug Administration inform this goal.

I have taught Ben in three different courses, and he consistently performed at the top of the class. Science Communication, a core MA course, focused on how to relay complex scientific information in a comprehensible and manageable way for the intended audience. Course assignments included the recording of a podcast, in which Ben excelled due to his prior experience on the radio both at the University of South Carolina and at Duke. He also was required to build a website from the ground up, which allowed him to further develop skills in accessible writing and design. Later, he put those skills to practical use in volunteering to repair *De Novo*, an introductory website for Duke Law students that hadn’t been updated in thirteen years. Despite many other pressures on his schedule, he made time for this because he knew how helpful it would be for the many terrified 1L students – as he had been.

Science Law and Policy is a course in which graduate ethics, law, and STEM doctoral students work to develop policy solutions to complex problems regarding technology and bioscience. His insights often



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focused on the practical impacts of a policy or regulation, and how it would be implemented in actuality—it was paramount to him that the theoretical basis for any rule be sound, but such a rule would crumble, no matter how strong the foundation, if impracticable. The subtext of the class, which he keenly perceived, was that in order to craft effective policy, all of these disciplines must be at the table together and they must all know how to speak to one another.

Finally, Ben is currently participating in a group readings course with the other JD/MA students, a small cohort that lends itself to his speaking style. Our reading selections focus on how the development of technology has altered our conceptions of privacy, and Ben has not been content to take those readings at face value. Instead, he investigates potential methodological flaws in the studies that the authors cite; he questions the philosophical foundations of the books; he challenges the definitions offered for certain terms, such as a “civil right to intimate privacy.”

Outside of class, I have seen him handle difficult situations under considerable pressure. During his 1L year, he interviewed with several nonprofits, firms, and agencies about potential employment for the summer of 2022 which would inform his interest in regulatory law, before finally settling on an internship with the National Institute of Environmental Health Science. He had this job lined up for months—and then, weeks before he was due to start and in the middle of spring exams, the internship position was eliminated. In response, he worked with his prior almost-employer to leverage connections within the other National Institutes of Health to find a replacement position, all while intensively preparing for exams, planning social events for the law school, and recovering from COVID. Within a couple of weeks, he landed on his feet at the NIH Department of Bioethics – which was probably a better job for him - performed well on his exams, and then immediately got to work applying for student journal memberships.

Ben will be working at the Food and Drug Administration, Office of the Chief Counsel, this coming summer. Before securing this position, he interviewed on-campus with multiple law firms without success. For someone who had performed well in class, had a dedicated commitment to a particular area of expertise, and had found leadership roles in many student organizations, it was an unexpected result that I could tell was hard for him to deal with. After struggling with this disappointment, he reached out to me and we met for lunch. We talked about the kinds of firms he had been applying to, his general interview strategies, and what he was looking for in the longer term. Throughout the conversation, it was clear to me that he was applying for jobs that he didn’t really want, just because the prevailing culture in the law school told him that he should. I am confident that in his interviews with these firms, consciously or not, he was unable to disguise his lack of passion for the jobs. I asked a few more questions, and ultimately realized that, above all, Ben wants to do something that matters, something that will serve society. And what matters above all to Ben is getting to the *truth* and doing it in the *right way* – above all “Be Honest”. Thus, he was ultimately successful in securing his FDA summer position, which better aligns with his interests and goals.

I am glad to see Ben pursuing a clerkship, because it is a natural extension of his talents and commitments to public service. I think the insights he will obtain working within the judicial system



MICHAEL B. WAITZKIN  
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will be invaluable in his future career. Whether as a student or as a clerk, he is deeply committed to making sure that his work is done properly, thoroughly and efficiently. I am confident that he would bring those qualities to your chambers, and wholeheartedly recommend him to you.

Sincerely,

Michael B. Waitzkin

Duke University School of Law  
210 Science Drive  
Durham, NC 27708

June 11, 2023

The Honorable Jamar Walker  
Walter E. Hoffman United States Courthouse  
600 Granby Street  
Norfolk, VA 23510-1915

Re: Benjamin Spencer

Dear Judge Walker:

I am writing to encourage you to hire Benjamin Spencer as a law clerk. I think very highly of him, and I think he will be a very strong clerk.

Ben did something a bit bold: he took my Administrative Law class in his first year. This is a new option at Duke (my spring 2022 offering of the class was the first time that first-year students had been allowed to take it), and few first-year students took it – the vast majority of the students in the class were second- and third-year students. To be blunt, it was fairly clear to me who the first-year students were: having had only one semester of law school, they did not have the same level of understanding and knowledge that the upper-level students did. Ben was the exception. I call on students randomly and accept some volunteers, and I found that Ben's comments in both situations were unusually careful and insightful. He consistently demonstrated that he had reflected on the materials and thought through their implications. He evinced the analytical abilities that are characteristic of good lawyers and good law clerks – seeing and understanding the big picture while retaining a keen grasp of the details. I was unsurprised to see that his exam was one of the strongest in the class.

Ben is personable and engaging, but not flashy. Some people bounce off the walls with energy or talk a mile a minute. Ben is not one of them. He is fairly quiet and self-effacing, at least when first meeting people. This can appear to be simple shyness, but my sense is that it reflects that he likes to think deeply about questions and avoids glibness. It may also reflect the fact he comes from a very small rural town (if a community of 45 people can even be called a "town").

Ben is a straight shooter who spends little time trying to position himself. He is not a self-promoter. He takes ideas seriously and really loves thinking through the implications of different legal arguments, but he does not take himself too seriously. He sees both sides of an argument and articulates his positions carefully without being arrogant or unpleasant. He demonstrates good judgment and is friendly even when he disagrees with others. I think all of this will serve him well as a clerk. Indeed, I think he will fit in well in any chambers.

I clerked on two different courts and have known many clerks and judges over the years, and I believe I have a sense of the qualities that make for a good law clerk. Ben has those qualities in abundance. He will be a great clerk.

Sincerely,

Stuart M. Benjamin  
William Van Alstyne Professor of Law

Duke University School of Law  
210 Science Drive  
Durham, NC 27708

June 11, 2023

The Honorable Jamar Walker  
Walter E. Hoffman United States Courthouse  
600 Granby Street  
Norfolk, VA 23510-1915

Re: Benjamin Spencer

Dear Judge Walker:

I write this letter of recommendation with enthusiasm in support of my student, Benjamin Spencer. Benjamin is a person whose competencies in writing, analysis and temperament will contribute to his success as a judicial clerk.

Benjamin is one of my most thoughtful, curious, earnest, and humble students. He grew up in the smallest town in South Carolina (45 people) and found his way to Duke Law School, where he was one of the highest performers in my Business Association course. He is intent on understanding all that he can and is refreshingly authentic in his demeanor. (For example, ask him about the role of courts and you will learn that they may have a role in promoting honesty.) Benjamin speaks in a considered way, with clarity and precision. His responses are balanced and considered, distinctive and original. Amongst many fine students, Benjamin is a standout for his quiet fortitude and humility.

I believe Benjamin is the type of well-rounded law student who could fit in nearly any court. He expresses sincere interest in regulatory law, from the perspectives of case law, its doctrinal tensions, and its administration. His decision to work at the Food and Drug Administration shows perhaps that he thinks for himself.

Benjamin thinks deeply inside boundaries but also across them. He is a pleasure to be around and has a wry sense of humor. (For example, ask him about the ten novels he wrote, and he will describe most of them as "terrible". But several of them are about teenage superheroes who slay all kinds of monsters while struggling to be understood by their families.) Benjamin would be a quiet delight to have in chambers, would be thoughtful, insightful, and disciplined, and would serve a Court in an exemplary way.

Should you have questions of a specific nature, please do not hesitate to contact me.

Very truly yours,

Sarah Bloom Raskin  
Colin W. Brown Distinguished Professor of the Practice  
Distinguished Fellow, Global Financial Markets Center  
Senior Fellow, Duke Center on Risk

Sarah Raskin - [sarah.raskin@duke.edu](mailto:sarah.raskin@duke.edu)



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### Writing Sample

This is a commentary on the Supreme Court case *Andy Warhol Foundation for the Visual Arts v. Goldsmith*. It is an academic piece written for the Duke Journal of Constitutional Law & Public Policy. A final line-edited version was published in January 2023. This version, completed in November 2022, has not been line-edited and has only incorporated general content feedback from two readers.

In 1981, Linda Goldsmith took a photograph of Prince. This photograph was then used by Andy Warhol for his *Prince Series*, a collection of silkscreens that was licensed for publication in both *Vanity Fair* and *Condé Nast* magazines. Following Prince's death in 2016, Goldsmith became aware of the Warhol works and argued that they were derivative uses of her original photograph. The District Court disagreed, and classified the *Prince Series* as fair use in a declaratory judgment for the Andy Warhol Foundation for the Visual Arts (AWF). The Second Circuit reversed, stating that the District Court had impermissibly considered the alleged "meaning or message" of the *Prince Series* in conducting its fair use analysis. AWF appealed, and the Supreme Court granted certiorari. This commentary was dedicated to analyzing the current extent of the safe harbor of fair use, exploring how the Second Circuit departed from established fair use precedent, predicting what the Supreme Court will decide, and recommending to the Court a path forward.

On May 18, 2023, the Supreme Court released an opinion that affirmed the judgement of the Second Circuit and, in very limited language, altered how courts are to evaluate claims of fair use. *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258 (2023). This commentary was incorrect in its prediction of how the Court would rule.

To decrease the page count, I have deleted the text and corresponding footnotes dedicated to discussing the oral arguments of the Petitioner, Respondent, and Unites States as amicus curiae before the Supreme Court. I am happy to send the complete document upon request, and the published line-edited version is available [online](#).

## It Ain't Real Funky Unless It's Got That Pop: Artistic Fair Use After *Goldsmith*

*Benjamin A. Spencer*

### **I. INTRODUCTION**

Born Prince Rogers Nelson, Prince was one of the most influential artists in history, transforming rock and pop music by drawing from his roots in Black funk and soul to assert an undeniable charisma and sexuality in his work.<sup>1</sup> Though people largely agree that Prince was a transformative musician, there is considerably more debate on whether Andy Warhol was a transformative artist.<sup>2</sup> This case presents an opportunity for the Supreme Court to weigh in on the nature of transformation in art, and what role that transformation may play in a proper fair use analysis.

In *Andy Warhol Foundation for the Visual Arts v. Goldsmith*, the Court will decide whether modification of an artwork's "meaning or message" suffices as "transformative" under the Court's established four-factor fair use analysis test.<sup>3</sup> Further, it will have the opportunity to clarify the sources of meaning and message that courts may consider, which may potentially include the artist's stated intentions, critical reviews, or a lay observer's interpretations.

The Court ought to find that a work's meaning or message can be considered when evaluating "transformativeness" under the four-factor balancing test. Such a finding would encourage continual development, innovation, and discourse in art and public expression, while protecting artists in a pop art culture built on commodification. To find otherwise would almost categorically eliminate the field of pop art and unduly restrict artists' ability to convey

<sup>1</sup> JOHN COVACH & ANDREW FLORY, WHAT'S THAT SOUND?: AN INTRODUCTION TO ROCK AND ITS HISTORY 414 (5th ed. 2018).

<sup>2</sup> Melissa Rossato, *The contradictions of Warhol: more than pop and color*, THE COLUMBIA CHRONICLE (Jan. 22, 2020), <https://columbiachronicle.com/the-contradictions-of-warhol-more-than-pop-and-color>.

<sup>3</sup> Petition for a Writ of Certiorari, *Andy Warhol Foundation for the Visual Arts v. Goldsmith*, U.S. (2022) (No. 21–869), 2021 WL 5913520, at i.

commentary and criticism. This decision would also comport well with long-established precedent and comply with the constitutional goal of “promoting the Progress of Science and useful Arts.”<sup>4</sup>

## II. FACTS

In 1981, Linda Goldsmith arranged to photograph the up-and-coming pop sensation Prince.<sup>5</sup> Prince attended the photography session for less than an hour and appeared uncomfortable and nervous around the lights and cameras.<sup>6</sup> He wore his own clothes to the studio and did not change his wardrobe, though Goldsmith did provide him with a black sash and lip gloss to show that he was “in touch with the female part of himself.”<sup>7</sup> The photographs from this session went unpublished.<sup>8</sup>

Subsequently, Vanity Fair approached Goldsmith in 1984 to license a photograph for use in a forthcoming magazine article on Prince entitled *Purple Fame*.<sup>9</sup> Goldsmith knew that the selected photograph would be used as an artist’s reference and was compensated \$400 by Vanity Fair.<sup>10</sup> She did not know that Andy Warhol was the artist involved.<sup>11</sup> Warhol proceeded to create the *Prince Series*, using Goldsmith’s photograph to create a group of sixteen artworks with his iconic color flattening and silkscreen techniques.<sup>12</sup> One of the pieces, *Purple Prince*, was used in the 1984 Vanity Fair article, and Goldsmith was credited as the original photographer.<sup>13</sup> She did not look at the article at the time.<sup>14</sup>

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<sup>4</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>5</sup> *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, 382 F. Supp. 3d 312, 318 (S.D.N.Y. 2019).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

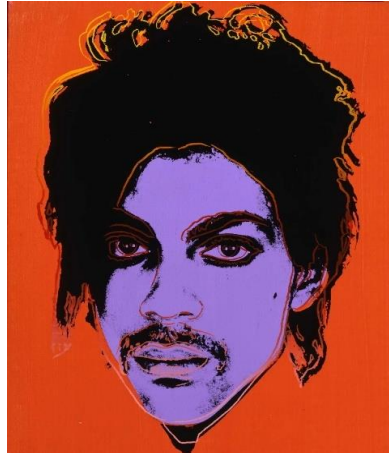
<sup>12</sup> *Id.* at 319.

<sup>13</sup> *Id.* at 318.

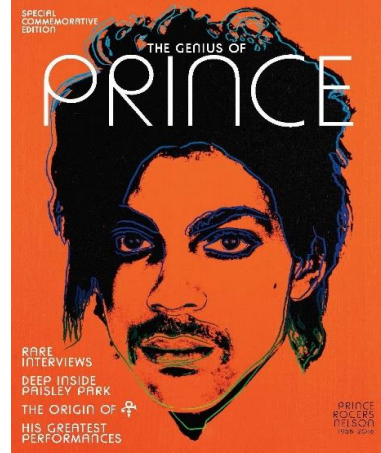
<sup>14</sup> *See id.* at 321.



Linda Goldsmith's original 1981 photograph of Prince.<sup>15</sup>



*Purple Prince* as used in the 1984 Vanity Fair article, "Purple Fame."<sup>16</sup>



*Orange Prince* as used in the 2016 Condé Nast commemorative edition.<sup>17</sup>

In the following years, the constituent artworks of the *Prince Series* were sold to museums and private collections.<sup>18</sup> After Andy Warhol's death in 1987, the Andy Warhol Foundation for the Visual Arts (AWF) assumed management and licensing of his artwork.<sup>19</sup>

When Prince died in 2016, Condé Nast approached AWF to license *Orange Prince* from the *Prince Series* as the cover art for a retrospective on Prince's life and career.<sup>20</sup> Condé Nast paid AWF \$10,000 for the licensing, and Goldsmith was not credited as the original photographer.<sup>21</sup> This time, Goldsmith saw *Orange Prince* on the magazine cover and recognized that the photograph underlying Warhol's work was the one she had taken years earlier.<sup>22</sup>

Goldsmith approached AWF, demanding a substantial payment for what she believed was an unauthorized, infringing use of her copyright. She argued that the *Prince Series* was a

<sup>15</sup> Answer and Counterclaim at 14, *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, 382 F. Supp. 3d 312 (S.D.N.Y. 2019) (No. 17-cv-02532-JGK), 2017 WL 6818950.

<sup>16</sup> Tristan Vox, *Purple Fame*, VANITY FAIR, Nov. 1984, at 66.

<sup>17</sup> *The Genius of Prince: Special Commemorative Edition* (Tom Prince ed.) (2016).

<sup>18</sup> *Goldsmith*, 382 F. Supp. 3d at 320.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 321.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

derivative work and that the law conferred to her, as the original artist, the exclusive right to control the photograph.<sup>23</sup> AWF, recognizing that litigation was imminent, sought a declaratory judgment from the Southern District of New York that *Orange Prince* and the remainder of the *Prince Series* were protected under fair use and were therefore not derivative works.<sup>24</sup> Goldsmith counterclaimed, asserting that the district court should declare that the *Prince Series* was derivative, grant her compensation for all past licensing uses, issue a permanent injunction on future licensing, and award her the copyright for the entire *Prince Series*.<sup>25</sup>

The district court engaged in a fair use analysis and granted AWF's request for a declaratory judgement, finding that *Orange Prince* was transformative as a matter of law and therefore protected under fair use.<sup>26</sup> Notably, the court stated that the "*Prince Series* works can reasonably be perceived to have transformed Prince from a vulnerable, uncomfortable person to an iconic, larger-than-life figure."<sup>27</sup> The remaining factors, including the creative nature of the secondary work, did not detract from this finding.<sup>28</sup> Goldsmith appealed to the Second Circuit, arguing that the district court had incorrectly and impermissibly weighed the claim of transformation.<sup>29</sup>

### III. LEGAL BACKGROUND

The goal of copyright law is to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective

<sup>23</sup> Complaint at 24, *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, 382 F. Supp. 3d 312 (S.D.N.Y. 2019) (No. 1:17-cv-02532), 2017 WL 1330503.

<sup>24</sup> *Id.* at 2.

<sup>25</sup> Answer and Counterclaim at 27, *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, 382 F. Supp. 3d 312 (S.D.N.Y. 2019) (No. 17-cv-02532-JGK), 2017 WL 6818950.

<sup>26</sup> *Goldsmith*, 382 F. Supp. 3d at 331.

<sup>27</sup> *Id.* at 326.

<sup>28</sup> *Id.* at 327.

<sup>29</sup> *Andy Warhol Foundation for the Visual Arts v. Goldsmith*, 11 F.4th 26, 32 (2nd Cir. 2021)

Writings and Discoveries.”<sup>30</sup> This constitutional grant of power allowed Congress to pass several copyright statutes, which the courts have expounded upon. In determining the boundaries of fair use, there is a tension between balancing the right of original creators to control their works and works derived from it and the benefit of creating a safe harbor for those who take copyrighted works and build upon them.<sup>31</sup>

### 1. Copyright Act of 1976

Ordinarily, the original author of a work has the right “to prepare derivative works based upon the copyrighted work.”<sup>32</sup> A derivative work is defined as “a work based upon one or more preexisting works, such as a translation... art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.”<sup>33</sup>

The Copyright Act of 1976 recognized that subjecting all secondary uses of a work to the original author’s control as derivatives would unduly restrict the ability of others to build upon and further develop that work. Thus, the goal of fair use is to provide a safe harbor for those who use copyrighted works for “purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research....”<sup>34</sup> The four factors to be considered when evaluating whether a secondary work is fair use are:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>35</sup>

<sup>30</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>31</sup> See *Folsom v. Marsh*, 9 F. Cas. 342, 345, 349 (D. Mass. 1841) (supporting the defense for “fair and reasonable criticism” and praising the adaptation of Washington’s letters for school libraries).

<sup>32</sup> 17 U.S.C. § 106(2)

<sup>33</sup> 17 U.S.C. § 101

<sup>34</sup> 17 U.S.C. § 107

<sup>35</sup> *Id.*

From this statutory baseline, the Supreme Court has explored, affirmed, and reaffirmed the guiding lights of the fair use inquiry.

## 2. *Common Law Precedent*

The earliest articulation of fair use was in *Folsom v. Marsh*, which involved two competing biographies of George Washington that used the first president’s unpublished personal letters as the basis for the narrative.<sup>36</sup> The courts used Justice Story’s articulation of fair use as common law until the Copyright Act of 1976 adopted the standard into statute, and it still contains persuasive power today.<sup>37</sup> As Justice Story explained, the duty of the judge in a fair use case is to “look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the original work” in rendering a judgment.<sup>38</sup>

The Supreme Court examined the four-factor test after the passage of the Copyright Act of 1976, this time in the context of a magazine publishing excerpts from President Gerald Ford’s memoirs before his autobiography was released.<sup>39</sup> This case contains three valuable insights. The first is the importance of the fourth factor—when there is a substantial impact on the market for the original work, the court is unlikely to find fair use.<sup>40</sup> The second is the nature of the copying—duplicating incidental qualities of a work is more acceptable than copying the “heart of the work.”<sup>41</sup> Even a small amount of copying can be infringement if it duplicates what was special and vital about the original work. Finally, fair use is an affirmative defense that must be

<sup>36</sup> *Folsom v. Marsh*, 9 F. Cas. 342, 345 (D. Mass. 1841).

<sup>37</sup> *See, e.g., Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 576 (1994) (praising *Folsom* as “distilling the essence of law and methodology”); *Harper & Row v. Nation Enterprises*, 471 U.S. 539, 550 (1985) (using *Folsom* as guidance for a fair use analysis).

<sup>38</sup> *Folsom*, 9 F. Cas. at 348.

<sup>39</sup> *Harper & Row*, 471 U.S. at 542-43 (1985).

<sup>40</sup> *Id.* at 566.

<sup>41</sup> *Id.* at 564.

proven—otherwise, the allegedly infringing work is derivative and the creator of the original work can exercise control.<sup>42</sup>

The foundational fair use case is *Campbell v. Acuff-Rose Music, Inc.*, which examined the doctrine in 2 Live Crew’s parody of Roy Orbison’s “Pretty Woman.”<sup>43</sup> Although parody is the paradigmatic example of fair use, the *Campbell* test has been used for other, non-parodic analyses as well.<sup>44</sup> The Court began by noting that the nature of fair use precludes the application of bright line rules, and that the factors need to be weighed holistically.<sup>45</sup>

Prior to *Campbell*, the strongest articulation of the first factor, referring to the purpose and character of the use, was that “every commercial use is presumptively unfair.”<sup>46</sup> However, the Court takes care here to demonstrate that there is far more to this factor than commercial use.<sup>47</sup> Rather, the first factor is aimed at discerning if the new work merely “supersedes the original,”<sup>48</sup> or if it “instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is ‘transformative.’”<sup>49</sup> The introduction of the word “transformative” to the fair use inquiry is taken from a law review article by Judge Pierre Leval, who defined the term to include criticism, exposing the character of the original author, proving a fact, debating ideas in the original, parody, symbolism, aesthetic statements, and “innumerable other uses.”<sup>50</sup> *Campbell*’s critical question is whether the new work could “reasonably be

<sup>42</sup> *Id.* at 561.

<sup>43</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 572-573 (1994).

<sup>44</sup> See Nunez, *supra* note 56.

<sup>45</sup> *Campbell*, 510 U.S. at 577.

<sup>46</sup> *Sony Corp. of America v. Universal City Studios*, 464 U.S. 416, 451 (1984).

<sup>47</sup> *Campbell*, 510 U.S. at 584.

<sup>48</sup> *Folsom v. Marsh*, 9 F. Cas. 342, 348 (D. Mass. 1841).

<sup>49</sup> *Campbell*, 510 U.S. at 579.

<sup>50</sup> Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARVARD L. REV. 1105, 1111 (1990). This specific language is a helpful guide, but was not adopted in *Campbell*, and as such is not binding.



perceived” as conveying a new meaning or message.”<sup>51</sup> The more transformative the work, the less that commercialism and other factors matter.<sup>52</sup>

*Campbell* revolved around parody, and much of the other law surrounding the other factors in the fair use inquiry is not directly applicable to the present matter. The fourth factor, regarding the impact of the secondary work on the market for the original, continues to play a significant role.<sup>53</sup>

Appellate courts have had myriad opportunities to apply *Campbell* in the context of transformative fair use analysis over the years. The case closest to the facts of *Goldsmith* comes out of the Seventh Circuit, where a Wisconsin clothing company took a photograph of the mayor of Madison, changed the color to a bright lime green, and added the caption “Sorry for Partying.”<sup>54</sup> Looking at the meaning or message of the work, the Seventh Circuit found that it was a form of political commentary, and thus transformative for the purposes of fair use.<sup>55</sup> Similar cases have been heard in the First, Third, Fourth, Sixth, Ninth, and Federal Circuits.<sup>56</sup>

The Supreme Court most recently discussed fair use in the context of computer code. Google copied basic Java program building tools verbatim into its Android platform to

<sup>51</sup> *Campbell*, 510 U.S. at 583.

<sup>52</sup> *Id.* at 579.

<sup>53</sup> *See id.* at 590 (since free use is an affirmative defense, the alleged infringer has the burden of providing evidence about market impact, though there is not an automatic inference of market harm); *cf. WEIRD: THE AL YANKOVIC STORY* at 23:00 (Funny or Die 2022) (exploring the commercial value of parody when the original work remains available).

<sup>54</sup> *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 757 (7th Cir. 2014).

<sup>55</sup> *Id.* at 759.

<sup>56</sup> *See, e.g., Nunez v. Caribbean International News Corp.*, 235 F.3d 18 (1<sup>st</sup> Cir. 2000) (finding new meaning in the republication of photographs to criticize the individual portrayed); *Murphy v. Millennium Radio Group, LLC*, 650 F.3d 295 (3d Cir. 2011) (the mere reproduction of a photograph on a website lacked any new meaning); *Brammer v. Violent Hues Productions, LLC*, 922 F.3d 255, 261, 263-64 (4th Cir. 2019) (no new meaning was added when a photograph was replicated for the sole purpose of portraying the subject of the photograph); *Balsley v. LFP, Inc.*, 691 F.3d 747 (6th Cir. 2012) (searching for meaning in a magazine’s usage of a preexisting photograph); *Seltzer v. Green Day*, 725 F.3d 1170 (9<sup>th</sup> Cir. 2013) (using a photograph as a concert backdrop added new meaning when contrasted with the performance); *Gaylord v. United States*, 595 F.3d 1364 (Fed. Cir. 2010) (a reproduction of the Korean War Memorial on a postage stamp did not add new meaning or criticism).

encourage developers to create cross-compatible apps.<sup>57</sup> The term “transformative” was clarified to mean the “add[ition] of something new and important.”<sup>58</sup> Though the dissent disagreed on the applicability of fair use to computer code, their articulation of transformation similarly recognized the value of adding new purpose to a work: “To be transformative, a work must do something fundamentally different from the original. A work that simply serves the same purpose in a new context... is derivative, not transformative.”<sup>59</sup> Interestingly, Justice Breyer explicitly stated that Andy Warhol’s *Soup Cans* is a paradigmatic example of fair use.<sup>60</sup>

Emerging from *Google*, the current Supreme Court precedent is that the fourth factor’s consideration of the impact on the market for the original work is important, that copying the heart of the work will weigh against an affirmative defense of fair use, and, critically, that one can consider the meaning or message in evaluating transformativeness under the first factor. The more transformative the use, the greater the likelihood the use is fair. In some cases, sufficient transformativeness may be dispositive.

#### IV. THE SECOND CIRCUIT’S HOLDING

The Second Circuit originally decided in favor of Goldsmith before the Supreme Court handed down *Google*.<sup>61</sup> Upon petition by AWF, the panel reheard the case to evaluate whether *Google* affected the outcome.<sup>62</sup> Deciding that *Google* did not refute their reasoning, the panel modified and rereleased its prior opinion.<sup>63</sup> The Second Circuit concluded that second, third, and fourth factors favored Goldsmith. The current controversy surrounds the court’s treatment of the first factor.

<sup>57</sup> *Google LLC v. Oracle America, Inc.*, 141 S. Ct. 1183, 1191 (2021).

<sup>58</sup> *Id.* at 1203.

<sup>59</sup> *Id.* at 1219.

<sup>60</sup> *Id.* at 1203.

<sup>61</sup> *Andy Warhol Foundation for the Visual Arts v. Goldsmith*, 11 F.4th 26, 51 (2nd Cir. 2021).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

On appeal to the Second Circuit, Goldsmith argued that the district court’s finding of fair use was “grounded in a subjective evaluation of the underlying artistic message of the works rather than an objective assessment of their purpose and character.”<sup>64</sup> The Second Circuit agreed, and it held that neither the actual or perceived intent of the artist, nor the impressions of the meaning or message of an artwork by a critic or judge can be considered when evaluating if a work is transformative.<sup>65</sup> Because the meaning of the artwork cannot be considered, artworks such as those by Andy Warhol become the mere imposition of another style onto a preexisting copyrighted work.<sup>66</sup> *Orange Prince* and the entire *Prince Series* thus become derivative works sharing the exact same purpose as Goldsmith’s original photo—to serve as portraits of Prince, regardless of potential interpretations of meaning or message.<sup>67</sup>

The Second Circuit leaves open only two avenues for meaning or message to play a role in evaluating transformation. The first is if the new work is commenting on the original work from which it draws inspiration. Absent such relation, the assertion of a “higher or different artistic use” is insufficient to show transformation.<sup>68</sup> The second is a collage, which is comprised of “distinct works of art that draw from numerous sources, rather than works that simply alter or recast a single work with a new aesthetic.”<sup>69</sup>

Outside of these avenues, purpose and character under the first factor can only be assessed by looking to whether the use of the source material was necessary for a “fundamentally different and new artistic purpose and character, such that the secondary work stands apart from

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<sup>64</sup> *Id.* at 32.

<sup>65</sup> *Id.* at 42.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Rogers v. Koons*, 960 F.2d 301, 310 (2nd Cir. 1992). The Second Circuit has previously stated in dicta that Warhol’s *Marilyn Triptych* is exactly the kind of transformational commentary that is protected by fair use. *Cariou v. Prince*, 714 F.3d 694, 706 (2nd Cir. 2013).

<sup>69</sup> *Goldsmith*, 11 F.4th at 41.

the raw material used to create it.”<sup>70</sup> The Court discarded the standard articulated in *Campbell* and used by the district court. This articulation of transformativeness is more restrictive than that previously utilized in the Second Circuit’s precedent, where it was permissible to consider the size, color, general composition, and nature of the works.<sup>71</sup>

## V. ORAL ARGUMENT

[ TEXT AND CORRESPONDING FOOTNOTES HAVE BEEN OMITTED ]

## VI. ANALYSIS

In *Campbell*’s articulation of the first factor, a different purpose and character was taken to include a new meaning and message.<sup>72</sup> This interpretation was affirmed in *Google*, as the addition of something “new and important” satisfied the first factor.<sup>73</sup> The Second Circuit wrote this consideration out of their analysis, resting their decision on the impossibility of objective interpretations of meaning and message and the commercial use of *Orange Prince* within the pages of a magazine.<sup>74</sup> Several issues make this position untenable.

Removing consideration of meaning or message from the law would solve a nonexistent problem—in the decades since *Campbell*, courts have aptly demonstrated their ability to apply the fair use standard consistently and effectively.<sup>75</sup> Only in extreme cases would a use be so transformative that the first factor would be dispositive—in the normal course of business, it would simply remain a thumb on the scale in evaluating a fair use defense.<sup>76</sup>

<sup>70</sup> *Id.* at 42.

<sup>71</sup> *Cariou*, 714 F.3d at 706.

<sup>72</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

<sup>73</sup> *Google LLC v. Oracle America, Inc.*, 141 S. Ct. 1183, 1203 (2021).

<sup>74</sup> *See Andy Warhol Foundation for the Visual Arts v. Goldsmith*, 11 F.4th 26, 41–42 (2nd Cir. 2021) (holding that all interpretations of art are subjective, and that both Goldsmith’s photograph and *Orange Prince* were essentially portraits).

<sup>75</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

<sup>76</sup> *Id.*

The Second Circuit’s inconsistency with binding precedent from the Supreme Court, persuasive authority from the other circuits, and its own prior holdings, is troubling. This comparison is most concerning with the case of the artist Jeff Koons, who’s 2002 *Easyfun–Ethereal* collage was created by taking cutouts from several different magazines and contrasting them against each other.<sup>77</sup> The Second Circuit held that “changes of its colors, the background against which it is portrayed, the medium, the size of the objects pictured, [and] the objects’ details”<sup>78</sup> were sufficient to show that the original photographs had been used “as raw material for an entirely different type of art... that comments on existing images by juxtaposing them against others.”<sup>79</sup> Koons’s artwork was therefore considered fair use.<sup>80</sup> Inspection of *Orange Prince* reveals that all of these criteria are met—the only salient difference being that *Orange Prince* is a silkscreen, while *Easyfun–Ethereal* is a collage drawn from multiple sources. If works that comment directly on the original and works that comment on each other are protected by fair use, then the exclusion of works that comment on social phenomena like fame, politics, and consumerism is arbitrary.

The articulation of a necessity requirement for fair use is also impractical. Requiring a particular photograph or precursor work to be necessary for an artist to convey his or her message would result in fair use rarely applying, if at all.<sup>81</sup> If only one photograph suitable for use as an artistic reference of a person existed, then use of it would be necessary.<sup>82</sup> However, if a

<sup>77</sup> *Blanch v. Koons*, 467 F.3d 244, 247 (2nd Cir. 2006).

<sup>78</sup> *Id.* at 253.

<sup>79</sup> *Id.* at 251 (quoting *Castle Rock Ent., Inc. v. Carol Publishing Group, Inc.*, 150 F.3d 132, 142 (2nd Cir. 1998)).

<sup>80</sup> *Id.* at 259.

<sup>81</sup> The only category of fair use likely to remain eligible would be parody, because parody has the express purpose of commenting on the original and requires borrowing from that original to do so. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580 (1994).

<sup>82</sup> Prior to *Campbell*, the Second Circuit had occasionally employed a necessity requirement regarding direct literary quotes from other works. Leval, whose articulation of “transformative” was accepted by the Supreme Court, disavowed the need for such a requirement as contrary to the purposes of fair use. *See Pierre N. Leval, Toward a Fair Use Standard*, 103 HARVARD L. REV. 1105, 1113-14 (1990).

second photograph existed, then neither image could meet the necessity requirement because the other photograph would be a possible alternative. Andy Warhol did not have to use Goldsmith’s photograph to create the *Prince Series*—but, had he used another photographer’s work, an identical controversy would arise with a different appellee.<sup>83</sup> The existence of multiple photographs of a person cannot render the fair use of one of them impossible.

A final point of concern is that the use of the term “transformative” for the first factor originally emerged in *Campbell*,<sup>84</sup> while “transform” is actually included in the statutory language regarding derivative works.<sup>85</sup> While ostensibly relevant, the common law histories of the words differ significantly—“transformative” was taken from a law review article and its specific, novel meaning in this context should not be neutered simply because the term shares an etymological origin with a term used elsewhere in the statute. Furthermore, 17 U.S.C. § 106 is expressly made subject to § 107 in the statutory text.<sup>86</sup>

The Court should reaffirm *Campbell* and reverse the Second Circuit, stating that meaning or message can be considered in evaluating the transformative nature of a work. This non-political doctrine was recently reaffirmed by six Justices in *Google*, which presented a significant stretching of the fair use defense—reversing the Second Circuit would comport well with long-established precedent while protecting the goals of fair use. After so ruling, the case could be remanded back down to the Second Circuit or District Court for a new balancing of the four factors by either judge or jury. Regardless of the factors considered, fair use is, and should always be, a holistic inquiry.

<sup>83</sup> Transcript of Oral Argument at 120, *Andy Warhol Foundation for the Visual Arts v. Goldsmith* (U.S. argued Oct. 11, 2022) (No. 21–869).

<sup>84</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

<sup>85</sup> 17 U.S.C. § 106

<sup>86</sup> *Id.*

## VII. CONCLUSION

In oral argument, Justice Gorsuch compared the application of the fair use defense to the present controversy with its application to Warhol’s *Soup Cans*, observing that “this is a much harder case.”<sup>87</sup> The goal of copyright law is to further the progress of science and useful arts by balancing the incentive of exclusive ownership rights with the incentive of a fair use safe harbor. Charting a course between the Scylla and Charybdis of unlimited free use and overly restrictive derivative works protections will be challenging. Luckily for the Court, it has a lighthouse to look to: *Campbell v. Acuff-Rose Music*. By taking meaning and message into account as one factor among many, *Campbell* laid down a practical, workable test that has been successfully invoked in many cases. Adding a necessity requirement or other hurdles would restrict artists from creating new works and fly in the face of an old commonsense maxim: “if it ain’t broke, don’t fix it.”<sup>88</sup>

The Court should stand by its precedent, and not fall prey to the pleas of either side to harshly restrict or overly expand the scope of fair use. Art is objective, subjective, beautiful, ugly, original, inspired, pleasing, disgusting, satisfying, and challenging—it is this multifaceted nature that allows it to convey new meanings and messages to all viewers, be they creators, critics, laymen, or lawmen.<sup>89</sup> As Justice Story wisely observed about copyright law in *Folsom v. Marsh*:

“This is one of those intricate and embarrassing questions, arising in the administration of civil justice, in which it is not, from the peculiar nature and character of the controversy, easy to arrive at any satisfactory conclusion, or to lay down any general principles applicable to all cases. Patents and copyrights approach, nearer than any other class of cases belonging to forensic discussions, to what may be called the metaphysics of the

<sup>87</sup> Transcript of Oral Argument at 109, Goldsmith (U.S. argued Oct. 11, 2022).

<sup>88</sup> *Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc.*, 784 F.2d 1325, 1347 (7th Cir. 1985) (Will, J., concurring).

<sup>89</sup> See LEO TOLSTOY, WHAT IS ART? 48, 50 (Alymer Maude trans., 1899) (1896) (essay on the role of art in conveying sensation, emotion, and knowledge).

law, where the distinctions are, or at least may be, very subtle and refined, and, sometimes, almost evanescent.”<sup>90</sup>

---

<sup>90</sup> Folsom v. Marsh, 9 F. Cas. 342, 344 (D. Mass. 1841).



## Applicant Details

First Name **John**  
 Middle Initial **N**  
 Last Name **Spinner**  
 Citizenship Status **U. S. Citizen**  
 Email Address [jns110@uakron.edu](mailto:jns110@uakron.edu)  
 Address

**Address**  
**Street**  
**1871 14TH ST**  
**City**  
**Cuyahoga Falls**  
**State/Territory**  
**Ohio**  
**Zip**  
**44223**  
**Country**  
**United States**

Contact Phone Number **3309623364**

## Applicant Education

BA/BS From **University of Akron**  
 Date of BA/BS **December 2021**  
 JD/LLB From **University of Akron School of Law**  
<http://www.uakron.edu/law/career>  
 Date of JD/LLB **December 1, 2023**  
 Class Rank **5%**  
 Law Review/Journal **Yes**  
 Journal(s) **Akron Law Review**  
 Moot Court Experience **No**

## Bar Admission

## Prior Judicial Experience

Judicial Internships/Externships **Yes**  
 Post-graduate Judicial Law Clerk **No**

## Specialized Work Experience

### Recommenders

Marcin, Phillip  
pjm@uakron.edu  
3309726480

Starnes, Sarah  
sstarnes@uakron.edu  
330 972 5291

Belsky, Martin  
belsky@uakron.edu  
330-972-6361

**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

**J. Noah Spinner**

1871 14th St., Cuyahoga Falls, Ohio 44223  
(330)-962-3364 • jns110@uakron.edu

**March 28, 2023**

The Honorable Jamar K. Walker  
U.S. District Court for the Eastern District of Virginia  
Walter E. Hoffman U.S. Courthouse  
600 Granby Street,  
Norfolk, Virginia 23510

**Dear Judge Walker,**

I am writing to apply for a clerkship with your chambers beginning in August 2024 through August 2025. I am a third-year law student at The University of Akron School of Law where I serve as the Executive Editor of Student Writing for the *Akron Law Review* and am in the top 5% of my class. I am excited to apply for a clerkship with your Chambers and the U.S. District Court for the Eastern District of Virginia as it is my desire to begin my legal career in public service to our federal courts and to explore our country. My most recent legal experience consisted of externing with the Honorable J. Philip Calabrese of the U.S. District Court for the Northern District of Ohio where I had the privilege of researching and writing matters pertaining to administrative review, civil rights, and sentencing guidelines. Outside of law school, I enjoy playing vintage baseball, the guitar, making bagels, and spending time with my significant other, Shelby.

Attached for your review are my résumé, law school transcript, and writing sample. The writing sample is a case I assisted in writing and researching, alongside Judge Calabrese and his law clerk, Vito Giannola. The case involved government officials alleging deprivation of procedural and substantive due process. The names of the parties have been changed for writing sample purposes. Letters of recommendation from the following are included herein.

Professor Martin H. Belsky  
The University of Akron School of Law,  
belsky@uakron.edu  
(330) 972-6361

Dr. Phil Marcin  
The University of Akron,  
pjm@uakron.edu  
(330) 972-6480

Professor Sarah Starnes  
The University of Akron School of Law,  
sstarnes@uakron.edu  
(330) 972-5291

Hon. J. Philip Calabrese  
U.S. District Court for the Northern  
District of Ohio,  
phil\_calabrese@ohnd.uscourts.gov  
(Letter not provided, but listed as a  
reference).

Thank you for your consideration. I would welcome the opportunity to interview with you and provide any additional information, discussing the attached materials more in detail.

Sincerely,  
**J. Noah Spinner**

## J. Noah Spinner

1871 14th St., Cuyahoga Falls, Ohio 44223  
(330)-962-3364 • jns110@uakron.edu

### Education

**The University of Akron School of Law** | Akron, Ohio | Candidate for Juris Doctor, December 2023 – GPA: 3.873/4.0

- Class Rank: 2 out of 114 (top 5%)
- Joint Juris Doctor-Master of Applied Politics candidate
- Executive Editor of Student Writing, Akron Law Review
- CALI Excellence for the Future Award (Contracts, Legal Drafting, UCC Sales, and Secured Transactions)
- Dean's List and Akron Law Honors Scholar

**The University of Akron** | Akron, Ohio | 2021

- Bachelor of Arts in Political Science, Minor in American Politics – GPA: 3.936/4.0 (Summa Cum Laude Honors)
- Ray C. and Ellen P. Bliss Political Science Scholarship, The Ray C. Bliss Institute of Applied Politics – 2018-2020

### Legal Experience

**Summer Associate** | Vorys, Sater, Seymour and Pease LLP – *Summer 2023*

**Fellow** | Property Law, University of Akron School of Law – 2023

- Guide and facilitate the understanding of Property Law for two class sections through review sessions, presentations, and questions

**Judicial Extern** | United States District Court for the Northern District of Ohio, The Honorable Judge J. Philip Calabrese – 2022

- Drafted and researched case opinions and legal memoranda for review by Judge Calabrese, including matters involving immigration, administrative review, civil rights, and sentencing variances
- Collaborated with fellow externs and Law Clerks regarding case assignments and research

**Study Abroad** | Ireland, The University of Missouri-Kansas City School of Law – 2022

- Studied European Union Law and Comparative Criminal Law in Cork and Dingle, Ireland, under the instruction of Professors Dermot Cahill (Bangor University), Dana Cole (The University of Akron School of Law), and Ed Hood (The University of Missouri-Kansas City School of Law)

**Fellow** | Akron Law PLUS Program, Law School Admissions Council and Akron School of Law – 2021

- Mentored future law students in a simulated law school program with an emphasis on diversity and inclusion in the legal profession

### Work Experience

**Beertender** | Missing Falls Brewery – 2021 - *Present*

- Facilitate customer experience through cheerful service and maintain facility cleanliness

**Ambassador Coordinator** | Summit Education Initiative – 2020

- Coordinated, strategized, and mobilized Ambassador recruitment for an adult education program entitled “College Restart” aimed at helping adults with college experience and no degree to return to school and finish their degree program

**Field Organizer** | Mike Bloomberg 2020, Inc. – 2020

- Organized and mobilized volunteers in direct voter contact, including canvassing, phone banking, and policy issued events

**Mascot, “Zippy”** | The University of Akron – 2018-2021

- Responsible for boosting school spirit and morale by interacting with University students and representing the University throughout the city of Akron, the state of Ohio, and neighboring states

**Candidate** | 36th House Seat of the Ohio House of Representatives – 2018

- Ran on a platform of Education, Equality, and Environment with an emphasis on youth involvement in policy decisions
- Oversaw voter outreach, communication, message delivery, and daily campaign operations
- Garnered 2,504 votes (42.2% of the vote) in a contested primary

### Leadership, Service, and Interests

**Eagle Scout** | Scouts BSA – 2017

- Organized and led 142 volunteers to carry out a cleanup and sustainability project at The University of Akron, Earth Day 2017

**Bike MS** | The National Multiple Sclerosis Society – 2012-2018

- Fundraise donations to support research funding for Multiple Sclerosis and cycle in MS awareness rides, including “Pedal to the Point”

**Vintage Base Ball** | The Akron Black Stockings Vintage Base Ball Club – 2019-Present

- Educate the community on the history and tradition of the game of “base ball” as it was played in the 1860s through active demonstrations

**Other Interests**

- I enjoy playing the guitar (folk rock and rock n’ roll), as well as going to the cinema, and spending time with my significant other, Shelby

## OFFICIAL ACADEMIC TRANSCRIPT

Name: John Spinner  
Student ID: 4281569

Page 1 of 1



Ronald L. Bowman, Jr., University Registrar

SSN: xxx-xx-9928  
Birthdate: 01-04-xxxx  
Print Date: 01/10/2023

Term GPA 4.000 Term Totals 17.000 17.000 64.000  
Cumulative GPA 3.921 Cumulative Totals 35.000 35.000 133.300

## Degrees Awarded

Program: Law School Full-time Program  
Plan: Law Major

Degree: Bachelor of Arts  
Confer Date: 12/11/2021  
Degree Honors: Summa Cum Laude  
Plan: Political Science BA/JD  
Plan: MINOR - Political Science - American Politics  
Plan: MINOR - Pre-Law

2022 Spring

Course	Description	Attempted	Earned	Grade	Points
9200 604	Const Law: Individual Rights	3.000	3.000	A-	11.100
9200 612	Professional Responsibility	3.000	3.000	B+	9.900
9200 629	Secured Transactions	3.000	3.000	A	12.000
9200 656	Law Review Staff	1.000	1.000	CR	0.000
9200 661	Environmental Law	3.000	3.000	A-	11.100

## Beginning of Law Record

Term GPA 3.675 Term Totals 13.000 13.000 44.100  
Cumulative GPA 3.857 Cumulative Totals 48.000 48.000 177.400

## 2021 Spring

Program: Law School Full-time Program  
Plan: Law Major

Course	Description	Attempted	Earned	Grade	Points
9200 602	Civil Procedure - Fed Litiga	3.000	3.000	A-	11.100
9200 607	Criminal Law	3.000	3.000	A	12.000
9200 609	Fundamentals of Lawyering	0.000	0.000	CR	0.000
9200 619	LARW I	3.000	3.000	A	12.000
9200 645	Property	4.000	4.000	A-	14.800
9200 676	Legislation and Regulation	2.000	2.000	A-	7.400

2022 Summer

Course	Description	Attempted	Earned	Grade	Points
9200 696	Externship Program	3.000	3.000	CR	0.000

Term GPA 0.000 Term Totals 3.000 3.000 0.000  
Cumulative GPA 3.857 Cumulative Totals 51.000 51.000 177.400

## 2022 Fall

Program: Law School Full-time Program  
Plan: Law Major

Term GPA 3.820 Term Totals 15.000 15.000 57.300  
Cumulative GPA 3.820 Cumulative Totals 15.000 15.000 57.300

Course	Description	Attempted	Earned	Grade	Points
LAWX 608	Evidence	3.000	3.000	A	12.000
LAWX 618	Advanced Legal Research	1.000	1.000	A	4.000
LAWX 622	Administrative Criminal Justice	3.000	3.000	A-	11.100
LAWX 658	Law Review Editorial Board	2.000	2.000	CR	0.000
LAWX 669	UCC-Sales	3.000	3.000	A	12.000
LAWX 684	Sem: Selected Legal Problems	3.000	3.000	A	12.000

Course Topic: Sem: Social Justice

Term GPA 4.000 Term Totals 3.000 3.000 12.000

Term GPA 3.931 Term Totals 15.000 15.000 51.100

Cumulative GPA 3.850 Cumulative Totals 18.000 18.000 69.300

Cumulative GPA 3.873 Cumulative Totals 66.000 66.000 228.500

## 2021 Fall

Program: Law School Full-time Program  
Plan: Law Major

Course	Description	Attempted	Earned	Grade	Points
9200 601	Civil Procedure - Fed Juris	3.000	3.000	A	12.000
9200 603	Const Law: Govt Authority	3.000	3.000	A	12.000
9200 611	Contracts	4.000	4.000	A	16.000
9200 625	Torts	4.000	4.000	A	16.000
9200 656	Law Review Staff	1.000	1.000	CR	0.000
9200 688	Legal Drafting	2.000	2.000	A	8.000

..... End of Transcript .....

The University of Akron

Name: John Spinner  
Student ID: 4281569

Page 1 of 2

*Ronald L. Bowman, Jr.*  
Ronald L. Bowman, Jr., University Registrar

Ronald L. Bowman, Jr., University Registrar

SSN: xx-xx-9928

Birthdate: 01-04-xxxx

Print Date: 11/04/2022

Degree: Bachelor of Arts

Confer Date: 12/11/2021

Degree Honors: Summa Cum Laude

Plan: Political Science BAJD

Plan: MINOR - Political Science - American Politics

Plan: MINOR - Pre-Law

Degrees Awarded

Course

Description

Attempted

Earned

Grade

Points

3230 151

Human Evolution

4,000

4,000

A

16,000

3580 102

Beginning Spanish II

4,000

4,000

A-

14,800

3700 150

World Politics & Government

3,000

3,000

A-

11,100

3700 300

Comparative Politics

3,000

3,000

A

12,000

7500 201

Exploring Music: Bach to Rock

3,000

3,000

A

12,000

Term GPA

3.876

Term Totals

17,000

65,900

Cumulative GPA

3.943

Cumulative Totals

37,000

145,900

Term Honor: Dean's List

2019 Summer

Program: Plan:

Arts & Sciences Undergraduate

Political Science BAJD Major

Course

Description

Attempted

Earned

Grade

Points

3370 100

Earth Science

3,000

3,000

A

12,000

3600 120

Introduction to Ethics

3,000

3,000

A

12,000

Term GPA

4,000

Term Totals\*

6,000

24,000

Cumulative GPA

3.951

Cumulative Totals

43,000

169,900

Term Honor: President's List

2019 Fall

Program: Plan:

Arts & Sciences Undergraduate

Political Science BAJD Major

Course

Description

Attempted

Earned

Grade

Points

3580 201

Intermediate Spanish I

3,000

3,000

B+

9,900

3700 301

Intro to Political Research

3,000

3,000

A-

11,100

3700 303

Intro to Political Thought

3,000

3,000

A

12,000

3700 336

Homeland Security Policy & Prc

3,000

3,000

A

12,000

3700 350

The American Presidency

3,000

3,000

A

12,000

3700 492

Selected Topics in Pol Sci

3,000

3,000

A

12,000

Course Topic:

ST: Camp Battle: Invisible Pri

Term GPA

3.833

Term Totals

18,000

69,000

Cumulative GPA

3.916

Cumulative Totals

61,000

238,900

Term Honor: Dean's List

2020 Spring

Program: Plan:

Arts & Sciences Undergraduate

Political Science BAJD Major

Course

Description

Attempted

Earned

Grade

Points

2020 121

English

3,000

3,000

A

12,000

3700 395

Intern: Government & Politics

6,000

6,000

A

24,000

3700 397

Indp Study: Political Science

3,000

3,000

A

12,000

Term GPA

4,000

Term Totals

12,000

48,000

Cumulative GPA

3.930

Cumulative Totals

73,000

286,900

Term Honor: President's List

2019 Spring

Program: Plan:

Arts & Sciences Undergraduate

Political Science BAJD Major

Star State College

Transfer Total:

6,000

Beginning of Undergraduate Record

Program: Plan:

College Credit Plus

General - Exploratory Non-Degree Seeking

Course

Description

Attempted

Earned

Grade

Points

3470 250

Statistics for Everyday Life

4,000

4,000

A

16,000

Term GPA

4,000

Term Totals

4,000

16,000

Cumulative GPA

4,000

Cumulative Totals

4,000

16,000

Program: Plan:

Arts & Sciences Undergraduate

Political Science Major

Course

Description

Attempted

Earned

Grade

Points

3200 289

Mythology of Ancient Greece

3,000

3,000

A

12,000

3560 101

Beginning Spanish I

4,000

4,000

A

16,000

3700 100

Government & Politics in US

3,000

3,000

A

12,000

3650 100

Introduction to Sociology

3,000

3,000

A

12,000

7600 105

Introduch to Public Speaking

3,000

3,000

A

12,000

Term GPA

4,000

Term Totals

16,000

64,000

Cumulative GPA

4,000

Cumulative Totals

20,000

80,000

Term Honor: President's List

2019 Spring

Program: Plan:

Arts & Sciences Undergraduate

Political Science BAJD Major

OFFICIAL ACADEMIC TRANSCRIPT



Name: John Spinner  
Student ID: 4281569

Page 2 of 2

*Ronald L. Bowman, Jr.*  
Ronald L. Bowman, Jr., University Registrar

Program: Arts & Sciences Undergraduate						2020 Summer	
Plan: Political Science BA/JD Major							
MINOR - Political Science - American Politics Minor							
MINOR - Pre-Law Minor							
Course	Description	Attempted	Earned	Grade	Points		
3700 361	Politics of the Crim Just Sys	3.000	3.000	A-	11.100		
3850 330	Criminology	3.000	3.000	A	12.000		
Term GPA		3.850	Term Totals	6.000	23.100		
Cumulative GPA		3.924	Cumulative Totals	79.000	310.000		
2020 Fall							
Program: Arts & Sciences Undergraduate							
Plan: Political Science BA/JD Major							
MINOR - Political Science - American Politics Minor							
MINOR - Pre-Law Minor							
Course	Description	Attempted	Earned	Grade	Points		
3580 202	Intermediate Spanish II	3.000	3.000	A	12.000		
3700 341	The American Congress	3.000	3.000	A	12.000		
3700 360	The Judicial Process	3.000	3.000	A	12.000		
3700 402	Politics and the Media	3.000	3.000	A	12.000		
3700 461	The Supreme Court & Const Law	3.000	3.000	A	12.000		
Term GPA		4.000	Term Totals	15.000	60.000		
Cumulative GPA		3.936	Cumulative Totals	94.000	370.000		
Term Honor: President's List							
Undergraduate Career Totals		94.000		370.000			
Cumulative GPA:		3.936		Cumulative Totals			
Non-Course Milestones							
Completion of Ohio Transfer Module		Completed					
Status:		Completed					
Program:		Arts & Sciences Undergraduate					
Date Completed:		06/13/2019					
Date Attempted:		06/13/2019					
Submitted Work							
..... End of Transcript .....							

**J. Noah Spinner**

1871 14th St., Cuyahoga Falls, Ohio 44223  
(330)-962-3364 • jns110@uakron.edu

**Unofficial Grade Sheet**

The following is an Unofficial Grade Sheet reflecting my courses taken, their respective instructors, credit hours, and final grade awarded. All courses, unless otherwise indicated, were taken at The University of Akron School of Law. I attest all grades and GPAs listed are accurate to the best of my knowledge. An official transcript has also been attached.

Sincerely,

**J. Noah Spinner**

-----

***Spring 2021***

<b>Course</b>	<b>Instructor</b>	<b>Credit Hours</b>	<b>Grade</b>
<b>Civil Procedure: Fed. Litigation</b>	Bernadette B. Genetin	3.0	A-
<b>Criminal Law</b>	Dana Cole	3.00	A
<b>Fundamentals of Lawyering</b>	Nancy Reeves	0.00	CR
<b>Legal Research, Analysis, and Writing I</b>	Sarah Starnes	3.00	A
<b>Legislation and Regulation</b>	Richard Lavoie	2.00	A-
<b>Property Law</b>	Brant Lee	4.00	A-

Term GPA: 3.82

Cumulative GPA: 3.82

***Summer 2021***

<b>Course</b>	<b>Instructor</b>	<b>Credit Hours</b>	<b>Grade</b>
<b>Legal Research, Analysis, and Writing II</b>	Sarah Starnes	3.00	A

Term GPA: 4.00

Cumulative GPA: 3.85



*Fall 2021*

Course	Instructor	Credit Hours	Grade
<b>Civil Procedure Fed. Jurisdiction</b>	Christopher J. Peters	3.00	A
<b>Constitutional Law: Government Authority</b>	Martin H. Belsky	3.00	A
<b>Contracts</b>	Carolyn L. Dessin	4.00	A
<b>Law Review Staff</b>	Willa Gibson	1.00	CR
<b>Legal Drafting</b>	Willa Gibson	3.00	A
<b>Torts</b>	George Horvath	4.00	A

Term GPA: 4.00

Cumulative GPA: 3.921

*Spring 2022*

Course	Instructor	Credit Hours	Grade
<b>Constitutional Law: Individual Rights</b>	Martin H. Belsky	3.00	A-
<b>Environmental Law</b>	James Yskamp	3.00	A-
<b>Law Review Staff</b>	Willa Gibson	1.00	CR
<b>Professional Responsibilities</b>	John ("Jack") P. Sahl	3.00	B+
<b>Secured Transactions</b>	Richard Lavoie	3.00	A

Term GPA: 3.675

Cumulative GPA: 3.857

*Summer 2022*

Course	Instructor	Credit Hours	Grade
<b>*Comparative Criminal Law</b>	Dana Cole	1.00	CR
<b>*European Union Law I</b>	Dermot Cahill	2.00	CR
<b>*European Union Law II</b>	Dermot Cahill	2.00	CR
<b>Judicial Externship</b>	Alisa Benedict O'Brien	3.00	CR

Term GPA: Credit

Cumulative GPA: 3.857

\* These courses do not appear on my official law school transcript. They were taken as part of a study abroad program to Ireland through the University of Missouri-Kansas City School of Law, and will transfer upon my graduation. Records available on request.

***Fall 2022***

<b>Course</b>	<b>Instructor</b>	<b>Credit Hours</b>	<b>Grade</b>
<b>Administration of Criminal Justice</b>	Michael Gentithes	3.00	A-
<b>Evidence</b>	Dana Cole	3.00	A
<b>Law Review Staff</b>	Willa Gibson	2.00	CR
<b>Social Justice</b>	Brant Lee	3.00	A
<b>UCC Sales</b>	Vera Korzun	3.00	A

Term GPA: 3.931

Cumulative GPA: 3.873

***Spring 2023***

<b>Course</b>	<b>Instructor</b>	<b>Credit Hours</b>	<b>Grade</b>
<b>Civil Rights and Access to Healthcare</b>	George Horvath	2.00	<i>In Progress</i>
<b>Foreign, Comparative, and International Law Research</b>	Kerry Lohmeier	2.00	<i>In Progress</i>
<b>International Negotiations</b>	Vera Korzun	3.00	<i>In Progress</i>
<b>Law Review Staff</b>	Stefan Padfield	1.00	<i>In Progress</i>
<b>Wills, Trusts, and Estates</b>	Carolyn Dessin	4.00	<i>In Progress</i>

March 28, 2023

The Honorable Jamar Walker  
Walter E. Hoffman United States Courthouse  
600 Granby Street  
Norfolk, VA 23510-1915

Dear Judge Walker:

Noah Spinner has asked me to write a letter of support for his application for a clerkship in your chambers. It is my judgment, having had him for several classes during his undergraduate career, that he is a dedicated, intelligent, and extremely hardworking student. I have had the pleasure of having Noah in four of my classes and I can confidently say that he is one of the best students I have had since I began teaching at The University of Akron in the Fall of 2012. He comes to class with a positive attitude, is always prepared, and enhances the classroom atmosphere. In addition, he was active, engaged, and willing to participate in all the classes he took with me.

He has asked me to provide you with insight into his writing skills and academic successes while earning his undergraduate degree in the Political Science Department at the University of Akron. As a result, this letter will focus on Noah's attributes as a student and provide insight into his abilities and character in that regard. I believe that Noah has both the professional as well as the personal characteristics that make him worthy of serving as a clerk. Students like Noah are the reason that I went into teaching and I miss having him in class. Serving as a clerk will provide him with a valuable opportunity to continue to learn and grow. At the same time, I think he will be an asset to you as well.

Noah distinguished himself among his peers for many reasons. He was one of the most serious and competent students in each class he took with me. His attendance was outstanding and he consistently came to class prepared to answer questions and he always participated in class discussions. In all of my classes, he finished the semester near the very top of the class, no matter the subject. He was an great student while also maintaining a rigorous work schedule outside of class. To me, this displays his strong commitment to his studies as well as his versatility as a student.

Noah demonstrated his intellectual ability and commitment in every class he took with me. Students in my classes are required to participate in a range of activities in order for me to gauge a variety of skills. He works well with others and he has strong writing, critical analysis, and communication skills. Additionally, students are required to read, interpret, and analyze Supreme Court decisions and scholarly articles. These are all areas in which he excels. In addition, Noah consistently completed and submitted his work in a timely fashion.

In my Introduction to Political Research class, he demonstrated his ability to conduct research and write in a clear and comprehensive fashion. Though analyzing empirical research can be a daunting task for undergraduate students, Noah did an outstanding job. For his final paper, he displayed a firm grasp of the research process. During the course of his research, he identified relevant variables related to his topic. He also created clear hypotheses, located appropriate quantitative research articles related to his topic, and he skillfully integrated his research into a sound literature review. Finally, he created an excellent research design that could be used to test his original hypotheses. The final result of his efforts was a sophisticated analysis of a very important social issue.

Noah also has a strong grasp of landmark Supreme Court cases and is able to use Supreme Court precedents to tackle current issues and questions before the courts. Thus, he understands many of the past decisions handed down by the Court and he

Phillip Marcin - [pjm@uakron.edu](mailto:pjm@uakron.edu) - 3309726480

can use those precedents to structure arguments on pending cases. In my Constitutional Law and Civil Liberties classes, students are required to read and analyze Court decisions each week and critically analyze them. Each and every week, he surpassed his peers with the quality and depth of his assignments. Each analysis he submitted was a comprehensive and clear analysis of complicated material.

He always received high scores on his assignments/exams. He was always prepared when he was asked questions in class. He frequently raised insightful and thoughtful questions about class subjects and demonstrated a strong grasp of class material. He has excellent communication skills and is willing to work with his fellow students. Additionally, he is an excellent writer. I can confidently say that his contributions to my classes improved the classroom experience for everyone. Noah is a hardworking, diligent, and serious student. He is respectful and helpful to those around him. No matter the class or time of year, he always brought a positive and constructive attitude to class and he was always willing to help others in need of assistance. I have seen this firsthand many times and I know that he acts this way consistently since he exhibited these qualities in all of his classes with me. I wish I had an entire class full of students of his caliber.

In addition to Noah's outstanding academic record, he genuinely cares about improving the world around him. I believe this to be equally important to his academic record. He is passionate about improving the world and this is reflected in his actions. He ran for office on a platform of improving the environment and reducing gun violence. His scholarship emphasizes greater citizen engagement in judicial elections. He recognizes that, through hard work and dedication, he can have a positive impact in the world. Frankly, I take comfort in the knowledge that people like Noah will help shape the world that my two young children will grow up in.

Ultimately it is my judgment that Noah has the skills and motivation to handle any work he is assigned, and I believe that he will excel as a clerk in your chambers. He is also motivated and eager to learn more and I believe that this combination of skills and drive will serve him well in this position. In my opinion, he will be a definite asset.

Please contact me if you would like more information or wish to speak in person, or by phone or email.

Dr. Phil Marcin  
Professor of Instruction  
The University of Akron  
Olin Hall 201a  
Email: [pjm@uakron.edu](mailto:pjm@uakron.edu)  
(330) 972-6480

Phillip Marcin - [pjm@uakron.edu](mailto:pjm@uakron.edu) - 3309726480

March 28, 2023

The Honorable Jamar Walker  
Walter E. Hoffman United States Courthouse  
600 Granby Street  
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing today in support of John (Noah) Spinner and to recommend him for a federal judicial clerkship. Noah is an outstanding student and individual. He is thoughtful, kind, dedicated, hard-working, and thorough in everything he does.

Noah began his law school career in the Spring of 2021 as one of the first members in Akron's 3+3 program, where he completed his last year of undergrad during his first year of law school. This alone demonstrates an eagerness to enter the legal field. It was apparent from the beginning of his first semester that he would be one of the brightest minds in my Legal Analysis, Research, and Writing classes. He was motivated to complete both classes in the spring and summer of 2021, with the goal of earning a spot on Akron's Law Review before completing his first full year of school.

As both a writing professor and librarian, I urge first year law students to take to heart how important writing and research is. There is no doubt Noah internalized this. He not only made Law Review but wrote an incredible note and is the incoming Executive Editor of Student Writing for the upcoming school year. He has also received academic commendation for his work in legal drafting. Halfway through his legal education, Noah has clearly demonstrated his commitment and desire for learning, maintaining his rank well within the top 5% of his class.

Working as hard as Noah does illustrates his dedication, passion, and eagerness to succeed and make an impact on the legal field. He clearly wants to make a difference and be a positive influence on others, as demonstrated by his leadership in the Akron Black Stocking's vintage baseball club, serving on student government, and being an active member and Eagle Scout in the Scouts BSA. His choice to serve as a fellow for the Akron Law PLUS Program shows his commitment to others, especially those less fortunate, and how important it is and how it's possible that they could attend and succeed in law school themselves.

Having such qualities like eagerness to learn, ingenuity, and exceptional communication skills are the keys necessary to become an asset to the legal profession. Noah encompasses all of these and would be an excellent clerk. I give him my recommendation gladly and without hesitation. If I can be of further assistance to you in your deliberations, please contact me.

Sincerely yours,  
Sarah K. Starnes, Esq.  
Associate Law Librarian, Reference Services  
Adjunct Professor of Legal Analysis, Research, and Writing

Sarah Starnes - sstarnes@uakron.edu - 330 972 5291

March 28, 2023

The Honorable Jamar Walker  
Walter E. Hoffman United States Courthouse  
600 Granby Street  
Norfolk, VA 23510-1915

Dear Judge Walker:

I had the pleasure of teaching and supervising John Spinner. Mr. Spinner was one of my top students in my courses - Constitutional Law I & II. Even though grades are anonymous, I have taken the opportunity of this reference letter to secure his papers and review them. Mr. Spinner was able to digest very complex fact patterns in both exams and to identify the issues, explain the legal aspects relating to those issues, and make conclusions. His papers were enjoyable to read.

I am not surprised that Mr. Spinner's exams were so well-written and analytical. I also had the opportunity to oversee his law review article "Called Strike Three." The paper went through several drafts, as all law review papers do. However, even in Mr. Spinner's first draft it was clear that he had done careful research and thoughtful analysis. His thesis was about a recent Ohio Law that provides for party labels of candidates for Ohio Courts of Appeals and Supreme Court. As is obvious by the title, he used a baseball analogy - how an impartial "umpire" would review the pros and cons and make a "call." Again, Mr. Spinner's writing is clear and analytical. As with his exams, it was enjoyable to read. More significantly, I learned a great deal about the issues and the history, politics, and impact of the new law.

Mr. Spinner's resume indicates his excellence. He is a named editor of the Law Review, helps potential and new students understand law school education and particularly Akron Law. His involvement in outside activities also shows his commitment to whatever he does.

In addition, hidden down in his resume is an activity that shows Mr. Spinner's sense of fun and why I always find my interactions with him to be both serious and enjoyable. For a number of years, he had served as the University's mascot - Zippy. That "job" requires him to interact with lots of people and respond warmly. It also involves a great deal of preparation and a large time commitment. He was able to do this and still manage to be a top student. That kind of time management and personal touch shows both his maturity and competence.

I hope you will seriously consider Mr. Spinner. He is an outstanding young man - student researcher, writer, leader, person.

Please feel free to contact me by cell call or message at 928-645-7837 or email, [belsky@uakron.edu](mailto:belsky@uakron.edu).

Sincerely yours,

Martin H. Belsky

Martin Belsky - [belsky@uakron.edu](mailto:belsky@uakron.edu) - 330-972-6361

**J. Noah Spinner**

1871 14th St., Cuyahoga Falls, Ohio 44223  
(330)-962-3364 • jns110@uakron.edu

**Writing Sample**

The following writing sample is from a case and order I researched and wrote in collaboration with Judge J. Philip Calabrese and his law clerk during my summer externship experience. **The parties and case number have been changed to protect the parties' interest and reflect confidentiality.** Certain sections have been omitted for length. A full version is available upon request.

The case surrounds a 42 U.S.C. § 1983 claim brought by two former officers (plaintiffs) against their former employer, Metro City, and Metro City's former mayor and interim police chief. In light of a press conference held by the interim police chief, which asserted allegations against plaintiffs, plaintiffs brought this suit claiming false light (state claim), as well as deprivation of both procedural and substantive due process as guaranteed by the Constitution.

Sincerely,

**J. Noah Spinner**

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

BUD ABBOT and	)	Case No. 123-456
JAKE BLUES,	)	
	)	Judge J. Philip Calabrese
Plaintiffs,	)	
	)	Magistrate Judge
v.	)	Jonathan D. Greenberg
	)	
LOUISE CAMPANELLA, <i>et al.</i> ,	)	
	)	
Defendants.	)	
	)	

**OPINION AND ORDER**

This case stems from events transpiring on August 2, 2015, where Defendant Louise Campanella was arrested and subsequently acquitted on domestic violence charges. Following Ms. Campanella’s arrest, Plaintiffs, Chief of Police Bud Abbot and Deputy Chief of Police Jake Blues, claim that Ms. Campanella, then mayor of Metro City, led a campaign of hostility and retribution against the police department because of their involvement in her arrest. Plaintiffs assert that Ms. Campanella’s vendetta against them and the City’s police department eventually led to their departure from the City’s employ.

Following Plaintiffs’ leave from the City, Interim Police Chief Leo McGary conducted an internal investigation into Plaintiffs’ handling of Ms. Campanella’s case. After the investigation, Mr. McGary held a press conference, summarizing the investigation and its findings. Plaintiffs assert that Mr. McGary’s statements put them in a false light by accusing them of tampering with evidence. Plaintiffs sued



Ms. Campanella, Mr. McGary, and Metro City, asserting that Defendants deprived them of procedural and substantive due process, defamed them, invaded their privacy, breached their settlement agreement, and that they have since spoliated evidence. Each Defendant now moves for summary judgment. For the reasons that follow, the Court **GRANTS in part** Defendants' motions for summary judgment and **DISMISSES** all of Plaintiffs' claims.

### **BACKGROUND**

Having reviewed the record, construing the facts in light most favorable to Plaintiffs, the non-moving parties, the Court's decision is based on the following facts.

#### **A. The Arrest**

On August 2, 2015, members of the City's police department responded to Ms. Campanella home upon suspicion of domestic violence against her son. (ECF No. 1, ¶ 12, PageID #8.) Mr. Abbot, the Chief of Police for the City, instructed his department to take the case to an outside prosecutor for impartial and independent review. (*Id.*, ¶ 15, PageID #9.) The outside prosecutor recommended charges against Ms. Campanella for domestic violence, which was seconded by an assistant county prosecutor seconded the recommendation. (*Id.*, ¶ 16 & 17, PageID #9.) Ms. Campanella was then arrested and charged with domestic violence and aggravated menacing. (*Id.*, ¶ 18, PageID #9.) A special prosecutor and visiting judge were assigned to her case. (*Id.*)

Ms. Campanella's arrest was widely publicized by local media. (ECF No. 62, PageID #1599.) The charges against Ms. Campanella were eventually dismissed after a finding that the evidence against Ms. Campanella was inadmissible. (*Id.*, ¶ 19, PageID #10.) Ms. Campanella and the City ultimately reached a financial settlement following her acquittal. (ECF No. 64, PageID #1883.) This agreement, while confidential, was made public at the urging of the City Council, paid Ms. Campanella \$450,000 and contained waiver and release provisions. (ECF No. 63, PageID #1674; ECF No. 64-8.)

#### **B. Ms. Campanella's Police Department Reform**

Plaintiffs maintain that following these events, Ms. Campanella began a campaign of retribution against them and the City's police department. (*Id.*, ¶ 21, PageID #10.) Plaintiffs claim that Ms. Campanella changed work hours, sick-time, and complaint policies and procedures against fellow officers. (ECF No. 1, ¶ 19, PageID #11.) Ms. Campanella maintained that the reforms were a key part of her initial election campaign and the policies implemented were meant to "enhance efficiency and professionalism of the police force." (ECF No. 62-1, ¶¶ 3-5, PageID #1619.)

Plaintiffs assert that Ms. Campanella's actions ultimately led to their premature exits from the City's police department. (*Id.*, ¶ 20(A), (B), PageID #11.) Citing Ms. Campanella and Mr. McGary's "campaign of harassment," Mr. Blues retired and left the force in January 2016. (*Id.*, ¶ 20(A), PageID #11.) Mr. Abbot was subsequently "suspended and dismissed" by Ms. Campanella on June 7, 2016, for

incompetency, neglect of duty, insubordination, and other various infractions. (*Id.*, ¶ 20(B), PageID #11; ECF No. 64.3.) Both Mr. Abbot and Mr. Blues entered into settlement agreements with the City upon their departures. (*Id.*, ¶¶ 20(A), 20(B), PageID #11.) The settlement agreements established rights and relationships between Plaintiffs and the City, including pension and benefit rights, release and waiver of claims and actions against the City and its employees arising out of Plaintiffs' departure, and confidentiality with respect to the terms of the settlement agreements. (ECF No. 63-9; ECF No. 63-11.)

Following Mr. Blues's departure, Mr. McGary, a retired Cleveland police officer and reserve officer with the City, was then appointed as the Interim Deputy Chief on March 8, 2016. (ECF No. 1, ¶ 5, PageID #6; ECF No. 65, PageID #2101.) Mr. McGary was then promoted to the City's Interim Chief of Police on June 7, 2016. (ECF No. 65, PageID #2102.)

### **C. The Internal Investigation**

When Mr. McGary became Interim Police Chief, he found in the Deputy Chief's desk—which was formerly Mr. Blues's—a flash drive containing information regarding Ms. Campanella's domestic-violence case. (ECF No. 65, PageID #2102). Later, on June 1, 2017, Mr. McGary was asked by the City's attorneys to obtain Ms. Campanella's case file, which he was told had been copied numerous times by Mr. Abbot and Mr. Blues. (*Id.*) Mr. McGary, who then moved into Chief of Police's office—Mr. Abbot's former office, discovered numerous documents and files concerning Ms. Campanella's arrest not included in the initial report. (*Id.*, PageID #2102–03.)

Concerned about these findings, Mr. McGary compiled the evidence and conducted an internal investigation into Ms. Campanella's arrest and how it was handled. Before releasing his findings, Mr. McGary had his investigation report reviewed by James McDonnell, a special prosecutor appointed by the City to oversee the investigation. (ECF No. 65, PageID #2103.) Mr. McDonnell opined that the investigation was sufficient to establish probable cause to arrest Mr. Abbot and Mr. Blues for tampering with evidence and that that Mr. Abbot's actions constituted as a dereliction of duty. (ECF No. 62-5)

#### **D. The Press Conference**

Later on, various members of the public demanded the release of Ms. Campanella's arrest records and settlement agreement with the City. (ECF No. 1, ¶ 22, PageID #12.) On July 29, 2017, City Councilman Kevin Roberts submitted a records request under Ohio law to obtain documents relating to Ms. Campanella's settlement agreement and arrest, threatening a lawsuit if the records remained withheld. (ECF No. 52-8, PageID #832–33; ECF No. 62, PageID #1600; ECF No. 70, PageID #2196.) At the direction of Ms. Campanella, partial records of her settlement agreement and arrest were released, including the settled amount. (ECF No. 70, PageID #2196; ECF 52-9, PageID #834–38.)

Shortly thereafter, on August 3, 2017, Mr. McGary held a press conference at the direction of the City. (ECF No. 1, ¶ 23, PageID #23.) In his remarks, Mr. McGary noted that it was an election year and wanted to get the facts straight regarding Ms. Campanella's arrest. (ECF No. 62-6.) Although he never mentioned Mr. Abbot and

Mr. Blues by name, Mr. McGary stated that there was probable cause to bring charges of tampering with evidence against two supervisory officers of the City's police department at the time of Ms. Campanella's arrest. (ECF No. 62-6; *See also* ECF No. 1, ¶ 23, PageID #13.) Mr. McGary made these remarks while also noting the reviewing prosecutor recommended the City not pursue the criminal charges. (ECF No. 62-6.) Mr. McGary continued that the officers' investigation into Ms. Campanella was politically motivated, and the charges imposed were "trumped-up" in retaliation against Campanella. (*Id.*)

Following these events, Ms. Campanella lost her reelection campaign. (ECF No. 1, ¶ 26, PageID #14.) Plaintiffs allege that during the remainder of Ms. Campanella's term, Ms. Campanella and Mr. McGary destroyed or altered evidence to interfere with or obstruct any potential action involving Plaintiffs. (*Id.*, ¶¶ 76–81, PageID #26.) No documents or other forms of evidence alleged to have been destroyed have been proffered by Plaintiffs, and no evidence has been provided to further support their claim for spoliation of evidence.

### PROCEDURAL HISTORY

[This section has been omitted for length. Plaintiffs had originally filed separate claims in state court in 2017, removing them then to federal court. Upon their removal, motion for summary judgement was granted in favor of Defendant Metro City, and claims against Metro City were dismissed.]

### SUMMARY JUDGEMENT STANDARD

Summary judgment is appropriate “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). On a motion for summary judgment, “the judge’s function is not [] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The Court, in doing so, must view the evidence in the light most favorable to the non-moving party. *Kirilenko-Ison v. Board of Educ. of Danville Indep. Schs.*, 974 F.3d 652, 660 (6th Cir. 2020) (citing *Matsushita Elec. Indus. Co.*, 475 U.S. 574, 587 (1986)).

“The party seeking summary judgment has the initial burden of informing the court of the basis for its motion” and identifying the portions of the record “which it believes demonstrate the absence of a genuine issue of material fact.” *Tokmenko v. MetroHealth Sys.*, 488 F. Supp. 3d 571, 576 (N.D. Ohio 2020) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). The non-moving party must then “set forth specific facts showing there is a genuine issue for trial.” *Id.* (citing *Anderson*, 477 U.S. at 250). “When the moving party has carried its burden under Rule 56(c), its opponent must do more than show there is some metaphysical doubt as to the material facts.” *Matsushita*, 475 U.S. at 586.

If a genuine dispute exists, meaning “the evidence is such that a reasonable jury could return a verdict for the nonmoving party,” summary judgement is not appropriate. *Tokmenko*, 488 F. Supp 3d at 576 (citing *Anderson*, 477 U.S. at 250). If

the evidence, however, “is merely colorable or is not significantly probative,” summary judgment for the movant is proper. *Id.* The “mere existence of some factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment.” *Scott v. Harris*, 550 U.S. 372, 380 (2007) (quoting *Anderson*, 477 U.S. at 247–48).

“Just as plaintiff may not rely on conclusory allegations to proceed past the pleading stage, so too a plaintiff may not rely on conclusory evidence to proceed past the summary-judgment stage.” *Viet v. Le*, 951 F.3d 818, 823 (6th Cir. 2020) (cleaned up). “Conclusory statements unadorned with supporting facts are insufficient to establish a factual dispute that will defeat summary judgment.” *Id.* (quoting *Alexander v. CareSource*, 576 F.3d 551, 560 (6th Cir. 2009)).

## ANALYSIS

### I. Section 1983 Claims

Plaintiffs, in Count I and II of their complaint, allege that Defendants deprived them of procedural and substantive due process because they were not afforded a name-clearing hearing after the August 2017 press conference. (ECF No. 1, ¶ 41, PageID #17–18.)

Section 1983 makes a person acting under color of State law liable for depriving a citizen of rights, privileges, or immunities guaranteed by the Constitution or federal law. 42 U.S.C. § 1983. Therefore, to find a person liable under Section 1983, the alleged person must be (1) acting under color of State law and (2) must have deprived the injured party of rights, privileges, or immunities guaranteed by the Constitution

or federal law. *Bloch v. Ribar*, 156 F.3d 673, 677 (6th Cir. 1998) (citing *Parratt v. Taylor*, 451 U.S. 527, 535 (1981)).

The Court finds that both Mr. McGary and Ms. Campanella were acting under color of State law. While there is a dispute as to whether Mr. McGary was properly appointed as the interim chief of police, there is no dispute that Mr. McGary was charged with and carried out the responsibilities and duties of chief of police for Defendant City. Further, because the City directed Mr. McGary to hold the press conference in which the claims in this case arise, the Court concludes that Mr. McGary was acting within his official capacity under the color of State law when he made his remarks.

As for Ms. Campanella, her involvement in the August 2017 press conference is disputed, but for the sake of this motion, is not disputed that any action she is alleged to have taken was when she was mayor of the City.

Therefore, the question then is whether Ms. Campanella and Mr. McGary deprived Plaintiffs of their due process rights.

#### **I.A. Procedural Due Process Claim**

[This section has been omitted for length. The Court found that “Plaintiffs proffer[ed] no evidence to support their constitutional right to a name-clearing hearing.”]

#### **I.B. Substantive Due Process Claim**

Plaintiffs also assert a substantive due process claim under Section 1983. They allege that Defendants violated their rights by depriving them of their reputations,



good names, prospective job opportunities, and lost wages because of the August 2017 press conference.

There are two types of substantive due process claims: (1) “claims asserting [a] denial of a right, privilege, or immunity secured by the Constitution or by federal statute other than procedural claims” and (2) actions by government officials that “shock the conscience.” *Meritek v. Blalock*, 983 F.2d 1353, 1367-68 (6th Cir. 1993); *see also Braley v. City of Pontiac*, 906 F.2d 220, 224-25 (6th Cir. 1990); *Wilson v. Beebe*, 770 F.2d 578, 583 (6th Cir. 1985). Plaintiffs maintain their claim falls into the latter category only. (ECF No. 71, PageID #2412–13.)

The Court adopts a high standard when determining if conduct by government officials shocks the conscience. *See Garcia v. Thorne*, 520 F. App’x. 304, 309 (6th Cir. 2013). Conduct that shocks the conscience must be so severe “as to transcend the bounds of ordinary tort law and establish a deprivation of constitutional rights,” and violate the decencies of civilized conduct. *Parate v. Isibor*, 868 F.2d 821, 833 (6th Cir. 1989) (quotation omitted); *Range v. Douglas*, 763 F.3d 573, 589-90 (6th Cir. 2014). The conduct must be “truly extraordinary in nature.” *Draw v. City of Lincoln Park*, 491 F.3d 550, 556 (6th Cir. 2007); *see also Garcia*, 520 F. App’x at 309.

Plaintiffs allege that Defendants’ conduct, namely the statements made by Mr. McGary, shock the conscience. Specifically, Plaintiffs claim that Mr. McGary’s appearing in a police uniform and claiming to be the chief of police, having the city council president authorize a special prosecutor to investigate Ms. Campanella’s 2015 arrest, publicly accusing Plaintiffs of tampering with evidence and obstruction of

justice, and asserting he was appalled by Plaintiffs' conduct in Ms. Campanella's 2015 arrest shocks the conscience. (ECF No. 71, PageID #2405–06, 2412–13.) Plaintiffs also allege Ms. Campanella's act of releasing a press statement calling them "rogue police leaders" further shocks the conscience. (ECF No. 70, PageID #2203.)

Drawing all reasonable inferences in favor of Plaintiffs, the non-moving parties, and ignoring for the moment that Plaintiffs were not deprived of any property right, the Court is not convinced that the statements made by Mr. McGary shocked the conscience. *See Garcia*, 520 F. App'x at 309 (concluding multiple calls made by the police in the middle of the night does not shock the conscience); *Parate*, 868 F.2d at 832–33 (concluding not renewing a contract of employment does not shock the conscience; *Vasquez v. City of Hamtramck*, 757 F.2d 771, at 772–73 (6th Cir. 1985) (concluding an alleged "malicious prosecution" and issuing a warrant for unpaid parking tickets does not shock the conscience); *Lillard v. Shelby Cnty. Bd. of Educ.*, 76 F.3d 716, 726 (6th Cir. 1996) (concluding even a track coach slapping a student in the face, as the Sixth Circuit so finds, falls short of "brutal" or "inhumane" activities as to shock the conscience).

Nothing said during the press conference violated the "decencies of civilized life" nor "transcend[ed] the bounds of ordinary tort law." The press conference was initiated at the public's inquiry of Campanella's arrest and at the City's urging. (ECF No. 1, ¶¶ 22–23, PageID #12–13; ECF No. 71, PageID #2405.) Mr. McGary merely rehashed what the internal investigation uncovered, which was reviewed by an

independent special prosecutor. (ECF No. 65, PageID #2103.) Therefore, Defendants' undisputed actions and relevant conduct fails to shock the conscience.

## II. State Claims

[This section has been omitted for length. The Court however found "[i]n light of the procedural background of this case—specifically that Plaintiffs had an opportunity to litigate their claims in state court, the complexity of the pending states claims, and the interests of judicial economy—the Court **DISMISSES WITHOUT PREJUDICE** Plaintiff's State-law claims of defamation, invasion of privacy, breach of contract, and spoliation of evidence."]

## CONCLUSION

For the foregoing reasons, the Court **GRANTS** Defendant motion to summary judgement on Plaintiffs' Section 1983 claims (Counts I & II) and **DISMISSES** them **WITH PREJUDICE**. Further, the Court **DISMISSES WITHOUT PREJUDICE** Plaintiffs' State-law claims (Counts III–VI.)

**SO ORDERED.**

Dated: [\_\_\_\_\_]

J. Philip Calabrese  
United States District Judge  
Northern District of Ohio

**Applicant Details**

First Name	Daniel		
Last Name	Stainkamp		
Citizenship Status	U. S. Citizen		
Email Address	<a href="mailto:dkamp@email.unc.edu">dkamp@email.unc.edu</a>		
Address	<table> <tr> <th>Address</th> </tr> <tr> <td> <b>Street</b>  <b>206 Purefoy Road</b>  <b>City</b>  <b>Chapel Hill</b>  <b>State/Territory</b>  <b>North Carolina</b>  <b>Zip</b>  <b>27514</b> </td> </tr> </table>	Address	<b>Street</b> <b>206 Purefoy Road</b> <b>City</b> <b>Chapel Hill</b> <b>State/Territory</b> <b>North Carolina</b> <b>Zip</b> <b>27514</b>
Address			
<b>Street</b> <b>206 Purefoy Road</b> <b>City</b> <b>Chapel Hill</b> <b>State/Territory</b> <b>North Carolina</b> <b>Zip</b> <b>27514</b>			
Contact Phone Number	(704) 246-9256		

**Applicant Education**

BA/BS From	University of North Carolina-Chapel Hill
Date of BA/BS	May 2009
JD/LLB From	University of North Carolina School of Law
	<a href="https://law.unc.edu/">https://law.unc.edu/</a>
Date of JD/LLB	May 1, 2024
Class Rank	20%
Law Review/Journal	Yes
Journal(s)	The North Carolina Law Review
Moot Court Experience	No

**Bar Admission****Prior Judicial Experience**

Judicial Internships/ Externships	No
Post-graduate Judicial Law Clerk	No

## Specialized Work Experience

## Recommenders

Frampton, Mary Louise  
mframpton@ucdavis.edu  
530 - 752 - 3273

Gurvich, Rachel  
gurvich@email.unc.edu

Kennedy, Joseph  
kennedy4@email.unc.edu  
919.843.3505

**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

## Daniel E. Stainkamp

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206 Purefoy Road, Chapel Hill, NC 27514 • (704) 246-9256 • daniel.stainkamp@unc.edu

May 17, 2023

The Honorable Jamar Walker  
United States District Court for the Eastern District of Virginia  
600 Granby Street  
Norfolk, VA 23510

Dear Judge Walker:

I am a 3L and a Merrill & Holt Scholar at the University of North Carolina School of Law, where I am ranked in the top twenty percent of my class. I serve as the Comments Editor of the North Carolina Law Review, for which I have the privilege of reviewing student scholarship, offering authors feedback, and preparing their work for publication. During the 2023–2024 academic year I plan to extern with the Federal Public Defender for the Eastern District of North Carolina, drafting appellate and trial briefs and entering duty court appearances. I have also been selected to serve as an Honors Writing Scholar.

At Carolina Law I have served in leadership roles, including as an Academic Enrichment Group Leader, mentoring 1Ls to improve writing, research, legal analysis, and exam-writing skills. In the past year, I have excelled in two of my courses, earning the High Merit Award in Constitutional Law and in Reading, Research, Writing, and Advocacy 2. These awards are given to the student who earns the highest grade in each course. This summer I will work as a summer associate at WilmerHale in Manhattan.

I am seeking a term clerkship with you because of your distinguished career in the realm law. I try today to live my life according to my personal values, which include service, equity, justice, anti-subordination, and advocacy for the dispossessed. I see your jurisprudence as emblematic of each of those values. I believe I must thoroughly familiarize myself with the work of jurists well-versed in a variety of practice fields to obtain a fully informed perspective, and to develop practical, workable solutions to the hardships created by injustice. It would be a privilege to serve in your chambers for the 2024–2025 term.

My considerable bank of life experiences enables me to draw from non-academic knowledge in my work. Prior to law school, I worked for four years in the legal field. I conducted pre-voir-dire research on potential jurors for multi-million-dollar civil litigation trials, and most recently I worked as intake manager at NC's largest criminal law firm, focusing on traffic law. At both jobs I was consistently recognized for my high proficiency, earning promotions to positions of responsibility and oversight.

At age 35, I have worked on a range of meaningful non-academic and non-work causes. I was a legal reporter during the RICO trial of the Greensboro Almighty Latin King and Queen Nation. I advocated for queer and trans prisoners through Hearts on a Wire during my time in Philadelphia. I have intensely scrutinized restorative justice practices as a researcher and writer on the Greensboro Massacre. My forthcoming Note publication in the North Carolina Law Review advocates for massive automatic debt cancellation for people who have effectively had their driving privileges revoked due to their poverty. And I am currently drafting another article discussing the rights of the mentally ill in the context of involuntary commitment.

The professors, community members, and business leaders I have worked with have praised my curiosity, diligence, and consistency. I believe these traits are well-suited for the demands of your docket. My maturity and my commitment to service are assets I am eager to put at your disposal. With this cover letter, I have included my résumé, writing samples, and an unofficial transcript. Letters of recommendation from Professors Mary-Louise Frampton, Joseph Kennedy, and Rachel Gurvich are included under separate cover. It would be a great honor to interview with you, and I thank you for your time and consideration.

Respectfully,



Daniel Stainkamp

# Daniel E. Stainkamp

206 Purefoy Road, Chapel Hill, NC 27514 • (704) 246-9256 • daniel.stainkamp@unc.edu

## EDUCATION

**University of North Carolina School of Law**, Chapel Hill, North Carolina

*Juris Doctor*, expected May 2024

Overall G.P.A.: 3.67 (Top Twenty Percent of Class)

- *North Carolina Law Review*, Comments Editor
- High Merit Awards: Constitutional Law; RRWA 2
- Honors Writing Scholar (2023 – 2024)
- National Lawyers Guild, Vice President (2022 – 2023)
- Academic Enrichment Group Leader (2022 – 2023)
- Merrill & Holt Scholar (2022 – 2023)

**University of North Carolina at Chapel Hill**, Chapel Hill, North Carolina

*Bachelor of Arts*, Journalism; minors in Philosophy and Poetry, May 2009

- *The Daily Tar Heel*, Staff Writer
- Dean's List four of eight semesters

## PUBLICATION

*Auto-Jubilee—A Case for Massive Automatic Driver's License Restoration for Debtor-Suspendees*, N.C. L. Rev. (forthcoming 2024).

## EXPERIENCE

**WilmerHale**, New York, New York

*Incoming Summer Associate* — May 2023 – July 2023

**The Greensboro Massacre — Justice on Trial**, Chapel Hill, North Carolina & Greensboro, North Carolina

*Legal Research Assistant* — December 2021 – present

- Conduct archival research and interview stakeholders, compile data to be used in upcoming book

**Criminal Law: Cases, Controversies and Problems, Second Edition (West)**, Chapel Hill, North Carolina

*Editorial Research Assistant* — May 2022 – August 2022

- Copyedited and line-edited a criminal law textbook written by UNC Law Professor Joseph Kennedy

**University of North Carolina School of Law Pro Bono Program**, Chapel Hill, North Carolina (83 hours)

- SNAP Felony Ban Research Project
- Eviction Research Project
- Juvenile Sentence Review Board Project
- Expunction Clinic Project

**iTicket.law**, Chapel Hill, North Carolina

*Intake Manager and Law Clerk*, December 2018 – October 2021

- Liaised with attorneys to prepare client case files
- Oversaw, mentored team of 12 legal assistants
- Managed intakes daily, pursued outreach and consulted clients regarding high-level offenses

**Jury-X**, Chapel Hill, North Carolina

*Editorial Coordinator, Trial Manager, and Researcher*, October 2017 – May 2020

- Oversaw a team of 12-14 legal researchers
- Compiled juror data for civil litigation trials
- Devised client education presentations; wrote reference, training and onboarding materials

**LAVA Community Center**, Philadelphia, Pennsylvania

*Board Member, Treasurer, Events Coordinator*, August 2013 – November 2016

- Facilitated monthly board meetings, managed finances, wrote grants, coordinated events, trained volunteers

**AmeriCorps**, The Servant Center, Greensboro, North Carolina

*Case Manager*, March 2011 – March 2012

- Coordinated resources and counseling for veterans experiencing mental illness, addiction, and homelessness

**ABCO Automation**, Brown's Summit, North Carolina

*Technical Writer*, November 2009 – February 2011

- Wrote end-user manuals for machine operators, collaborated with supervisor to design diagrams, edited copy

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